83-2004

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

**Appendix To
Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit
(668a-1214a)**

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ZENITH RADIO CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.,*
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.,*
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Aug. 7, 1980.

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Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, Kevin R. Keating, Michael S. Press, New York City, Pepper, Hamilton & Scheetz by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., and Sanyo Elec. Trading Co., Ltd., defendants.

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Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION

(Admissibility of Public Records and Reports)
Pretrial Order No. 283

EDWARD R. BECKER, District Judge.

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I. *Preliminary Statement*

This is the first of several opinions that will address the myriad issues raised during the course of a lengthy pretrial evidentiary hearing in this antitrust case, the anatomy and scope of which have been described elsewhere.[1] The hearing, which commenced on June 16, 1980, and terminated on July 18, 1980, has had a two-fold purpose. First, it has enabled us to

[1] *See* Opinion (Introduction to Summary Judgment Motions: Subject Matter Jurisdiction), *Zenith Radio Corp., et al.*, v. *Matsushita Electric Industrial Co., Ltd. et al.*, 494 F.Supp. 1161 at 1164-67 (E.D. Pa. 1980.)

rule upon the admissibility of a number of documents that play a critical role in plaintiffs' case so that we will know whether to consider them in ruling upon defendants' motions for summary judgment, particularly their motions addressed to plaintiffs' conspiracy claims.[2] Second, the hearings were *in limine*, and

[2] All defendants filed motions seeking summary judgment on one or more claims. Some are joint motions; others are motions by individual defendants, some of which are joined by other defendants; some motions are addressed to discrete legal issues; others are omnibus motions addressed to several issues. We have already (1) denied a motion seeking summary judgment for lack of subject matter jurisdiction, *see* note 1, *supra;* (2) granted in major part defendants' motion for summary judgment on those claims arising under § 801 of the Revenue Act of 1916, better known as the 1916 Antidumping Act, 15 U.S.C. § 72, *see* Opinion and Order (1916 Antidumping Act), *Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1190 (E.D. Pa. 1980); (3) denied a motion for summary judgment brought by certain defendants against plaintiff Zenith Radio Corp. on the ground that Zenith was not directly injured and was therefore barred from recovery under the doctrine of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *see* Opinion and Order (Indirect Injury-*Illinois Brick), Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1246 (E.D. Pa. 1980); (4) denied a motion asserting that plaintiff National Union Electric Corp. lacked standing to sue under the doctrine of *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974), *see* Opinion and Order (Antitrust Standing-*Bangor Punta), National Union Electric Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 498 F.Supp. 991, (1980); (5) denied a motion by defendant Sears, Roebuck & Co. for summary judgment based on statute of limitations grounds, *see* Pretrial Order 263, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, M.D.L. No. 189 (May 23, 1980); and (6) denied a motion by Sharp Electronics Corp. claiming that Zenith's claims under the 1916 Antidumping Act are barred by the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), *see* Memorandum and Order, (1953 Treaty of Friendship, Commerce and Navigation with Japan), *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.* 494 F.Supp. 1263 (E.D. Pa. 1980). A motion asserting insufficiency of evidence of the monopolization and attempted monopolization claims against individual defendants under § 2 of the Sherman Act (the so-called "individual monopolization claims") has in major part dissolved, although some of the same arguments will be reasserted in connection with defendants' omnibus conspiracy motion, to the extent that they relate to collective Sherman Act § 2 violations. An individual motion by Sony Corporation advancing its

have provided the forum for a pretrial ruling on the question whether plaintiffs have come forward with a fair preponderance of independent evidence ("evidence *aliunde*") of the existence of a conspiracy among the various defendants to enable them to proceed with their conspiracy claims. *See United States* v. *Bey*, 437 F.2d 188 (3rd Cir. 1971) and its progeny, cited in *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980).

As we commenced these hearings, we realized that both of these undertakings, which for the most part overlap, were formidable. As appears from plaintiffs' 17,000 page final pretrial statement (FPS),[3] plaintiffs' case is erected primarily upon

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allegedly unique position as a high price, rather than a low price, seller of television sets has, following argument, been deferred to be considered with the other conspiracy motions, on the ground that there is too much overlap among defendants to make separate consideration for Sony feasible. We have heard argument on a motion asserting insufficiency of the evidence of price discrimination under the Robinson-Patman Act and on motions addressed to the claims under § 7 of the Clayton Act, and intend to dispose of those motions shortly. Finally, later this month we shall hear argument on defendants' series of motions addressed to plaintiffs' conspiracy claims, which allege, *inter alia:*

(a) that there is a lack of evidence of conspiracy;

(b) that the evidence of consciously interdependent parallel behavior, required to prove conspiracy, is insufficient;

(c) that the "check-price agreements," which plaintiffs contend are central to defendants' conspiracy, were mandated by the Japanese Ministry of International Trade and Industry (MITI) and hence cannot be condemned by the United States antitrust laws under the act of state and sovereign compulsion doctrines, and principles of international comity; and,

(d) that in order to prove predatory intent for purposes of their claims of monopolization, dumping, and Robinson-Patman violations, plaintiffs must advance evidence of pricing below marginal cost, or its surrogate average variable cost (the standard advanced by Professors Areeda and Turner) and that failure to come forth with such evidence requires the grant of summary judgment on such claims.

[3] Pretrial Order 154, reprinted at 478 F.Supp. 946, 949-50 (E.D.Pa. 1979), required plaintiffs to set forth in their Final Pretrial Statement, with preclusionary effect, every fact "including subsidiary and supporting facts,

documents. Both the FPS and the list of evidence *aliunde* which plaintiffs have filed pursuant to Pretrial Order No. 154, as refined by Pretrial Order Nos. 22, 227, and 232, list approximately 250,000 documents, the originals of many of which are in Japanese.[4] Obviously, no one could read 250,000 documents within a reasonable time, even if all the Japanese language documents had been translated into English, which they have not.

Even prior to the commencement of the hearings, however, and with the concurrence of counsel for the plaintiffs and defendants, we concluded that a reading of only a small portion of these documents was necessary. A substantial number are transactional or other documents which are of the same or similar form or genre; hence, a sample is sufficient for consideration and omnibus ruling. Many of the documents are in the nature of general background material. Many of the documents relate to the issue of damages, which is not now before us. And many of the documents are, for other reasons, unrelated or of peripheral relevance to either the summary judgment motions or the *in limine* conspiracy determination. As we imperfectly, though correctly, perceived prior to the hearings, and as is now

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that they intend to prove at trial, keyed to specific witnesses, documents, and depositions, together with a specific enumeration by the plaintiffs of the facts (evidence *aliunde*) by which they intend to prove each defendant's complicity in the alleged conspiracy." As noted in our opinion on subject matter jurisdiction, *see* n.1, *supra*, the final pretrial statements were also intended to act in large part as surrogates for incomplete discovery.

[4] No one has counted the number of documents listed, and 250,000 (apparently 250,000 document pages) is only an estimate. Some 100,000 pages of documents are filed in the central document depository, located in our jury room. Certain defendants have moved to strike plaintiffs' list of evidence *aliunde* on the ground that it flouts the spirit, if not the letter, of our requirement that plaintiffs set forth a list of the documents upon which they rely as evidence linking each defendant to the conspiracy alleged. In defendants' view plaintiffs' list is useless in that it is essentially a summary of plaintiffs' entire Final Pretrial Statement, incorporating "hundreds of thousands" of documents, which are not described in any way and are identified only by number. We have not yet ruled on defendants' motion to strike. It may well be mooted by the *modus procedendi* followed in connection with the evidentiary hearings.

eminently clear in the wake thereof, notwithstanding the avalanche of paper under which this case has become buried over the course of a decade, there are a not insubstantial but discrete number of critically important documents that are central to the case and upon which, in not inconsiderable measure, it must stand or fall. These are the documents upon which we have focused during these hearings.

The important documents fall into a number of broad categories as follows:

1. Documents, including certain findings, promulgated by the U.S. Treasury Department and U.S. Tariff Commission in connection with proceedings under the 1921 Antidumping Act.

2. Documents, including certain findings, promulgated by the U.S. Tariff Commission and its successor, the U.S. International Trade Commission (I.T.C.) as well as the Secretary of Labor under §§ 301(b)(1) and (c)(1) and (2) of the Trade Expansion Act of 1962 and §§ 201(b) and 221 of the Trade Act of 1974.

3. Certain purported findings and related documents of the Japanese Fair Trade Commission (JFTC) arising out of proceedings in two cases before the JFTC, one, in 1957, brought against the Home Electric Appliance Market Stabilization Council, some of whose members are defendants in this action,[5] alleging industry-wide price-fixing, and the second, brought in 1967, alleging retail price maintenance against defendant Matsushita Electric Industries Co., Ltd.

4. The findings of Judge A. Leon Higginbotham, Jr., our predecessor in this case, regarding personal jurisdiction and venue, found at 402 F.Supp. 262 (1975).[6]

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[5] Parties to this action who were also members of the Market Stabilization Council are Matsushita Electric Industrial Co., Ltd., Hitachi, Ltd., Mitsubishi Electric Corp. and Sanyo Electric Co., Ltd. Toshiba Shoji Co., Ltd., a non-party subsidiary of defendant, Tokyo Shibaura Electric Co., Ltd. was also a member.

[6] The "judicial history" of this case, *i.e.*, the sequence of assigned judges, is explained in Opinion (Introduction to Summary Judgment Motions; Subject Matter Jurisdiction), *Zenith Radio Corp. et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1161, 1164 n. 5 (E.D. Pa. 1980).

5. Statistical data from the statistical office of the United Nations and a report of the Organization for Economic Cooperation and Development.

6. Diaries of officials of several of the Japanese defendants, alleged to contain evidence of the conspiracy referenced in plaintiffs' complaint, which were seized in 1966 and utilized in the course of JFTC Case No. 6 of 1966 (the so-called "Six Company Case"). That case was an investigation and proceedings against six of the defendants, Sanyo Electric Corp., Tokyo Shibaura Electric Corp. (Toshiba), Hayakawa Electrical Industry Corp. (now Sharp Corporation), Hitachi Industry Corp., Matsushita Electric Industry Corp. (MEI), and Mitsubishi Electric Corp. (MELCO). The six companies were charged with a conspiracy to fix prices and to engage in a variety of activities in violation of the Japanese Anti-Monopoly Law. The eight diaries in dispute have been attributed to a Mr. Yajima, an employee of Toshiba (3 diaries); Messrs. Yamamoto (2 diaries) and Yamada, both employees of Hitachi; a Mr. Okuma, an employee of MELCO; and Mr. Tokizane, an employee of MEI. Also included in this category are a number of internal company memoranda also seized by the JFTC.

7. Transcripts of testimony and of protocols by witnesses in the Six-Company case. A protocol is a written statement outlining the substance of oral discussions between a JFTC staff member and a witness, which the witness signs to indicate that the contents comport with his statement.

8. Various agreements and rules of certain Japanese manufacturers' associations relating to export practices.

9. Various documents alleged to be minutes or memoranda of meetings of committees of certain manufacturers' associations.

10. A purported internal memorandum of the Japan Victor Company, 51% of which is owned by MEI, allegedly reflecting the decision made by the Electronic Industries Association of Japan (EIAJ) to conceal from the Japanese Ministry of Inter-

national Trade and Industry (MITI) the discrepancy between domestic and export prices and suggesting changes in accounting methods by which such concealment could be accomplished.

11. Various memoranda, letters, telexes, and transactional documents produced by the defendants in discovery and involving the Japanese manufacturers, their trading companies, their American sales subsidiaries and various U.S. customers, which, in plaintiffs' submission, show a pattern of "under the table" or concealed rebates that reduced the price of Japanese TVs to American customers below the so-called check price that was reported to U.S. Customs, and which also reveal a "cover-up" of what plaintiffs describe as a predatory export scheme.

12. A potpourri of other documents, produced for the most part from defendants' files during discovery.

13. Voluminous reports setting forth the opinions (with supporting data) of plaintiffs' experts.

This opinion will consider the admissibility of the matters set forth in the first five categories enumerated above. We took these matters up together in the hearings and decide them together because all involve, or are alleged to involve, the admissibility of public records and reports under Rule 803(8) of the Federal Rules of Evidence (F.R.E.). Consistent, however, with the *modus procedendi* of the evidentiary hearings, we shall consider all provisions of the F.R.E. bearing upon admissibility of a given piece of evidence, including those dealing with relevancy. The rulings which we announce herein relate to plaintiffs' claims against the defendants. We do not discuss and do not purport to decide whether all or any of these documents may be used by plaintiffs or by defendants in connection with defendants' counterclaims, since it is conceivable that some of these documents may be offered for a nonhearsay purpose to establish facts relevant to these counterclaims and the defense thereof.

Before proceeding further, it is important to say a word or two about the appropriateness of the course of pretrial evidentiary determinations we are following.

The Manual for Complex Litigation, in § 1.80, counsels the early resolution of preliminary legal questions. As outlined at p. 1136, *supra*, we view these hearings against the background of two primary, overriding, and overlapping preliminary determinations. First, we must assess whether plaintiffs have met their burden of coming forth with sufficient evidence *aliunde* of the existence of a conspiracy among the various defendants to enable them to go forward with their conspiracy claims. *See United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). Additionally, we must rule on defendants' outstanding motions for summary judgment, and it is indisputable that a Rule 56 determination must be made upon admissible evidence. *See* Rule 56(e).

In determining admissibility under Rule 56, the same standards apply as at trial. *See Munoz* v. *International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 207 n.1 (5th Cir. 1977); *608 Hamilton Street Corp.* v. *Columbia Pictures Corp.*, 244 F.Supp. 193, 195 (E.D.Pa.1965). Thus, in ruling upon summary judgment motions, courts refuse to consider hearsay (*Daily Press, Inc.* v. *UPI*, 412 F.2d 126, 133 (6th Cir.), *cert. denied*, 396 U.S. 990, 90 S.Ct. 480, 24 L.Ed.2d 453 (1969); *Trist* v. *First Federal Savings and Loan Association*, 466 F.Supp. 578, 588-89 n. 15 (E.D.Pa.1979) (Lord, Ch. J.)); unauthenticated documents (*California Pacific Bank* v. *Small Business Admin.*, 557 F.2d 218, 222 (9th Cir. 1977); *United States* v. *Dibble*, 429 F.2d 598 (9th Cir. 1970)); inadmissible expert testimony (*Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 671-74 (D.C.Cir.1977); *Herbert* v. *Lando*, Civ. No. 74-434 (CSH) (S.D.N.Y. March 19, 1980)); documents without a proper foundation (*Hamilton* v. *Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976)); parol evidence (*Starling* v. *Valmac Industries Inc.*, 589 F.2d 382 (8th Cir. 1979)), and even evidence barred by the dead man's rule (*Super Valu*

Stores Inc. v. *First National Bank*, 463 F.Supp. 1183, 1192-93 (M.D.Ga.1979)).

In order to act upon the outstanding summary judgment motions, we must therefore assess the admissibility of disputed items of evidence. To do so in an *in limine* proceeding will greatly expedite the trial and will avoid duplicative argument. Such a proceeding comports with § 4.22 of the Manual for Complex Litigation, which suggests that the court make pretrial rulings on objections to documentary evidence. Wright & Graham set forth a list of factors bearing upon the use of *in limine* rulings in particular cases. *See* 21 Wright & Graham, *Federal Practice and Procedure*, § 5037 at 193-95. The factors favoring such rulings include increasing trial efficiency and promoting improved accuracy of evidentiary determinations by virtue of the more thorough briefing and argument of the issues that are possible prior to the crush of trial. To these salient factors we add the utility of *in limine* rulings in connection with summary judgment motions. Countervailing factors include inadequacy of the record prior to trial, the possibility that the issue may not arise at trial, and the burdensomeness of *in limine* proceedings.

As will be seen as we proceed through the materials before us, the evidentiary issues in this case are complex. Detailed briefing and argument have been essential, as can be seen from the fact that even after argument, we found it necessary to request supplemental briefing on over twenty issues that arose during colloquy. To devote the kind of attention to these matters that they require during, rather than before, trial, would create delays that would be terribly unfair to the jury. Furthermore, because many of the categories of items offered for rulings during these pretrial hearings comprise major chunks of plaintiffs' case, a pretrial ruling will permit counsel for both sides to make efficient use of their trial preparation time by narrowing the issues, and, to the extent that they may to some degree be outcome determinative, permit interlocutory review which might save many months of trial otherwise conducted in error.

Of the inhibiting factors, none apply to this case. Our record is not inadequate, for we consider the summary judgment motions based upon an extensive record as set forth in plaintiffs' preclusive final pretrial statement, *see* n. 3, *supra*. Because the documents under consideration are the critically important ones, they would certainly be offered for our consideration at trial. As to the burdensomeness of these proceedings, we need only note that the issues must be faced sometime, and now, before a jury is empanelled, strikes us as better than later.

In the course of describing this litigation, we have had occasion to observe that it spans the law of antitrust. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 478 F.Supp. 889, 893 (1979), *vacated and remanded*, 631 F.2d 1069 (3rd Cir., 1980). It is appropriate at this juncture to observe that the issues raised in the evidentiary hearings span the law of evidence, or at least the Federal Rules of Evidence (F.R.E.) and pose a number of questions which are apparently of first impression under those rules. Of critical importance, and often of not inconsiderable difficulty, are problems arising under the following Rules: 104 (Preliminary Questions of Admissibility); 401 (Relevant Evidence); 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time); 410 (Inadmissibility of Pleas, Offers of Pleas and Related Statements); 602 (Lack of Personal Knowledge); 605 (Competency of Judge as Witness); 702 (Testimony by Experts); 703 (Bases of Opinion Testimony by Experts); 704 (Opinion on Ultimate Issue); 705 (Disclosure of Facts or Data Underlying Expert Opinion); 801(d)(2) (Admission by Party-Opponent); 803(5) (Recorded Recollection); 803(6) (Records of Regularly Conducted Activity); 803(8) (Public Records and Reports); 803(24) and 804(b)(5) (The Residual Hearsay Exceptions); 804(b)(1) (Former Testimony); 804(b)(3) (Statement Against Interest); 805 (Hearsay Within Hearsay); 806 (Attaching and Supporting Credibility of the Claimant); 901 (Authentication); 902 (Self Authentication); 1003 (Admissibility of Duplicates); and 1005 (Public Records). Also implicated are the general constructional rule (Rule 102) and the relationship of many of the

Rules inter se; e.g., 104 and 901; Rules 104 and 803(6); Rules 703 and 803(8).

Because Rule 403 assumed a prominent role in many facets of our hearings and because of its potential scope, we think it useful to comment at the outset on the appropriateness of making Rule 403 determinations at a pretrial hearing.

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although there appear to be no cases discussing the applicability of Rule 403 to motions for summary judgment, there are many cases in which pretrial rulings have been made under Rule 403. *See Thomas* v. *C.G. Tate Construction Co.*, 465 F.Supp. 566 (D.S.C.1979) (motion *in limine* by defendant to prohibit personal injury plaintiff from offering films of himself into evidence); *Depew* v. *Hanover Insurance Co.*, 438 F.Supp. 358, 360 (E.D.Tenn.1977) (motion *in limine* to prohibit defendants from offering testimony regarding deceased's statements implicating plaintiff in alleged arson); *Grimes* v. *Employers Mutual Liability Insurance Co. of Wisconsin*, 73 F.R.D. 607, 610 (D.Alaska 1977) (motion *in limine* in personal injury action to determine admissibility of films of plaintiff); *United States* v. *Jackson*, 405 F.Supp. 938, 943-45 (E.D.N.Y.1975) (motion *in limine* by defendant to exclude evidence of presence in another jurisdiction and use of a false name); *Apicella* v. *McNeil Laboratories*, 66 F.R.D. 78, 86 (E.D.N.Y.1975) (motion *in limine* to preclude parties from using medical newsletter at trial in action against drug manufacturer). *See also United States* v. *Bocra*, 623 F.2d 281 at 284 (3rd Cir. 1980) (affirming grant of motion *in limine* to preclude defendant from mentioning other bribe cases involving I.R.S. agent); *United States* v. *Nu-Phonics, Inc.*, 433 F.Supp. 1006, 1014 (E.D.Mich.1977) (establishing rule that economic evidence would be excluded in antitrust conspiracy prosecution if it were too distant in time from duration of alleged conspiracy).

Because pretrial rulings expedite the trial and eliminate surprise, *in limine* rulings on objections under Rule 403 are favored by the commentators. *See* Manual for Complex Litigation, § 4.22; 22 Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5224 at p. 320-21 (1978) (Wright and Graham); Saltzburg & Redden, *Federal Rules of Evidence Manual* (2d ed. 1977) at 116. In their discussion of Rule 403, Wright and Graham state that:

> Courts and commentators generally agree that any inquiry into preliminary facts in an invocation of discretionary exclusion should be heard out of the earshot of the jury. This suggests the desirability of a pretrial hearing where the issue is important and complex. The use of the motion *in limine* for this purpose should be encouraged.

Accordingly, when objections have been made to otherwise admissible evidence based upon factors enumerated in Rule 403, we have considered them and include our 403 determinations in these evidentiary opinions.

By way of preliminary "across the board" discussion, we also address two principles that plaintiffs ask us to apply generally to all of the evidentiary questions before us. First, they read in F.R.E. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined") a charter of liberality in the admission of evidence and a presumption that would require us, where the question is close, to err on the side of admissibility. We do not so read Rule 102. While we agree that the Rules are designed to be flexible, we do not see that flexibility as favoring admission where specific requirements set forth in particular rules are not met. To read Rule 102 as giving the court unbridled discretion would essentially render the individual rules meaningless. In this regard we endorse the comments of Saltzburg and Redden in *Federal Rules of Evidence Manual* (2d ed. 1977) at 14:

When Rule 102 states that the Federal Rule shall be construed to the end that the truth may be ascertained and proceedings justly determined, does this signify that whenever the Judge is doubtful as to whether evidence should be admitted or excluded, he should err on the side of admission in order to aid the search for truth?

The answer must be NO for several reasons. First, the Fourth Article of the new Federal Rules makes it clear that certain evidence must be excluded even though it is relevant, because it is too prejudicial or possibly too confusing. In such instances, the search for truth would not be aided by admitting this evidence. When the Trial Judge has doubts about the admissibility of evidence, he must always remember to balance the possible prejudicial effect of evidence against its probative value. Only then can he be sure that the search for truth is aided by his ruling. Second, the Rules also recognize that there are other policies served by rules of evidence aside from reaching accurate decisions as to what happened in a particular case. In dealing with offers to compromise, evidence of insurance, subsequent remedial measures, and privileges, for example, the Trial Judge must consider factors other than accurate reconstruction of historical facts. Finally, Rule 102 itself notes that the Rules must be construed to eliminate unjustifiable expense and delay. In short, there are other factors to be weighed against the probative value of evidence.

Professors Saltzburg and Redden's observation about delay is especially pertinent in the context of this case, which we have estimated will take at least a year to try.

Second, plaintiffs place great reliance on certain statements of Judge Forman in *United States* v. *General Electric Co.*, 82 F.Supp. 753, 903 (D.N.J. 1949); "Broad discretion and great latitude are permitted in the reception of evidence in conspiracy cases . . . Exaggerated and over-refined niceties in the rules of evidence must give way to the broad terms of Rule 43(a), Federal Rules of Civil Procedure, if full effect of the anti-trust laws is to be given." *Accord, United States v. E.I. DuPont de Nemours and Co.*, 10 F.R.D. 618, 621 (D.Del. 1950) (Leahy, J.). Plaintiffs thus advance the principle that more liberal evidentiary rules apply in antitrust cases. In response,

we note only that these opinions preceded the Federal Rules of Evidence by many years and that we have found nothing in the Rules themselves to indicate that they are to be applied less (or more) stringently in antitrust cases than in any other kind of lawsuit.

Our pretrial evidentiary hearings have consisted mostly of legal argument and colloquy, although on some points testimony has been taken. Numerous and lengthy supporting briefs and affidavits have been filed. Each piece of evidence to be considered has been accompanied by what we have termed a Document Submission Sheet (DSS). The DSS was prepared in three stages: the proponent of the evidence prepared Part I, identifying the document, referencing it to the FPS and enclosing it within a folder (both Japanese original and English translation, in cases of Japanese language documents). The party opposing admission completed Part II, setting forth the grounds of objection, and the proponent then completed Part III, stating its rejoinder. A copy of the DSS is attached as an exhibit to this opinion.

The hearings were grueling. They consumed almost five weeks, with most sessions running into the early evening (and one running well past midnight). Notwithstanding the length of the hearings, we were unable to cover all of plaintiffs' critical documents but will consider them on the basis of detailed post-hearing submissions and supplemental memoranda.

We turn first to a discussion of the basic principles of Rule 803(8), with particular emphasis on 803(8)(C), to be followed by an application of these principles (and those of Article IV of the F.R.E.-Relevancy and Its Limits) to the specific documents at issue here.

II. Rule 803(8)—Its Scope and its Requisites

A. *Matters Admissible Under 803(8)(C)*

Rule 803(8) creates an exception to the hearsay rule for:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the

> activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The first two elements of the Rule, sections (A) and (B), are relatively simple and, at least as applied to civil actions, are essentially self-explanatory. They represent a codification of generally accepted evidentiary principles, and we shall not dwell upon them herein.[7] Section (C), on the other hand, is quite complex, and represents a major change from common law principles.[8] For, quite contrary to what was generally permitted at common law, under the aegis of 803(8)(C), materials representing the distillation of a process that may have involved years of investigation and the taking of thousands of pages of testimony may be presented to the trier of fact in one fell swoop.

A graphic example may be found in *In Re Plywood Antitrust Litigation*, 1979-1 Trade Cases ¶ 62,459 (E.D.La. 1978) in which three manufacturers of softwood plywood were alleged

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[7] One point that has arisen with respect to 803(8)(B) is whether it or Rule 803(6) is applicable to what might be considered a business record prepared by a public official. The weight of authority seems to be that 803(8)(B) applies, *see United States* v. *Orozco*, 590 F.2d 789 (9th Cir.), *cert. denied*, 439 U.S. 1049, 99 S.Ct. 728, 58 L.Ed.2d 709 (1979); *United States* v. *Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States* v. *Smith*, 521 F.2d 957 (D.C.Cir. 1975). *Cf. Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) (803(8)(B), rather than 803(5) (Recorded Recollection), applied to police report). We agree with these decisions and do not apply 803(6) to the public records and reports at issue herein.

[8] Judge Rubin in *Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264, 1266 (S.D. Ohio 1979) termed 803(8)(C) "one of the most controversial exceptions to the hearsay rule."

by a class of purchasers to have conspired in violation of the Sherman Act to fix and maintain a system of delivered prices. The private antitrust case followed on the heels of a lengthy Federal Trade Commission (FTC) proceeding under § 5a of the FTC Act, which had involved the same facts. Judge Pointer, relying on 803(8)(C), admitted into evidence in the antitrust trial findings of an FTC Administrative Law Judge and lengthy excerpts from the FTC's opinion.

The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings ("reports . . . setting forth . . . factual findings . . ."). It is clear, however, that the intent of the drafters was to permit admission of a somewhat narrower class of materials, *i.e.*, factual findings set forth in reports. The question thus becomes what constitutes a factual finding, a question that is not free from difficulty given the general willingness of the courts to admit as 803(8)(C) material the so-called evaluative report, which often contains, in addition to findings, a large amount of material that is not independently admissible.[9] *See* discussion *infra*.

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[9] The Advisory Committee Note accompanying 803(8)(C) makes clear the intent of the drafters to permit admission of the evaluative report. The House Committee on the Judiciary, however, adopted a narrow interpretation of the term "factual findings":

> The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

Report of the Committee on the Judiciary, H.R. Rep. No. 93 650, 93d Cong., 1st Sess. 14 (1973), 1974 U.S. Code Cong. & Admin. News pp. 7051, 7088.

The Senate rejected this construction:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (C) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (C) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary

tiffs' Final Pretrial Statement (FPS), with preclusive effect.[4] We later decided that a second step was necessary—the holding of pretrial evidentiary hearings at which we could focus clearly on plaintiffs' key documents and also rule on admissibility since summary judgment motions are to be determined on the basis of admissible evidence. *See* Rule 56(e).

Even before the FPS was filed, the emanations from the JFTC proceedings pervaded the case. During the course of many pretrial conferences, and in the initial summary judgment briefs, we were constantly confronted with plaintiffs' allegations that the documents seized by the JFTC during the course of the Six Company Case were laden with evidence of conspiratorial activities by the defendants, in both the domestic Japanese and the export markets. The most frequently cited sources were the three diaries of Seiichi Yajima, an official of Toshiba Corp. The significance of Yajima's diaries was underscored when the FPS was finally filed, for it contained no less than 600 references to them.

The FPS was similarly suffused with references to other documents which had their source in the JFTC proceedings, many of which were likewise represented as demonstrating the existence of a broad based unitary conspiracy to destroy the American consumer electronic products industry by a low price predatory export conspiracy funded or "war-chested" by conspiratorial high prices in Japan. Because of the extremely broad and allegedly damning implications of the JFTC material as portrayed in the FPS, it became evident to us that the intensive scrutiny of all of the critical documents was a condition precedent to any full and fair decision on the summary judgment motions.

On the other hand, the references to import-related documents were, generally, more limited in character. What is reflected in most of the import related documents is a practice

[4] The FPS was required by Pretrial Order 154, *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 478 F.Supp. 889, 946 (E.D.Pa. 1979), *rev'd on other grounds*, 631 F.2d 1069 (3d Cir. 1980).

on the part of the Japanese manufacturers to give rebates to the American importers. These rebates had the effect of reducing the actual price paid by importers below the "check-price" divulged to American customs authorities and to the Japanese Ministry of International Trade and Industry (MITI). The existence of the rebate practice is not disputed by most of the defendants (although they do dispute plaintiffs' allegations of customs fraud). While the plaintiffs contend (and defendants deny) that a variety of inferences may be drawn from these documents that point to concerted activity by defendants and their co-conspirators in furtherance of a predatory export scheme, the important point here is that the fact of the rebate payments is not generally in issue. As a result, the admissibility *vel non* of most of these documents is not significant for the Rule 56 motion.

We will thus consider—and at some length because of its importance—the admissibility of Mr. Yajima's diary. Also to be considered at some length, because they are alleged to be of similarly great import are the diaries of Messrs. Yamamoto and Yamada, both employees of Hitachi; Mr. Okuma, an employee of MELCO; and Mr. Tokizane, an employee of Matsushita. During the course of the Six Company Case proceedings, Mr. Yajima and a number of other officials of Japanese companies were interviewed and gave statements, referred to herein as "protocols." They also gave formal testimony at hearings before the JFTC. In plaintiffs' submission, the protocols and testimony contain significant evidence of conspiratorial activity by defendants, and also authenticate the diaries under Federal Rule of Evidence 901 and qualify them as business records within the meaning of Federal Rule of Evidence 803(6).[5] These matters will also be treated at length, as will certain of the materials produced in discovery relating to the activities in Japan of Japanese manufacturers or manufacturers' associations.

The evidence whose admissibility is treated in this opinion is not only of critical importance to plaintiffs' case in chief, but it

[5] We abbreviate "Federal Rules of Evidence" hereinafter as "F.R.E."

also forms a major part of the factual basis for the opinions of their expert witnesses, the admissibility of which we will consider in a subsequent opinion. In plaintiffs' submission, the documents coming from Japan demonstrate that the Japanese consumer electronic products manufacturers, including the seven manufacturing defendants, Matsushita (MEI), Toshiba, Hitachi, Sanyo, Melco, Sharp, and Sony, entered into conspiratorial arrangements, effectuated through a series of monthly meetings involving mid-level to top-level management, the purpose of which was to fix prices in Japan at a high level in order to finance the predatory export campaign to destroy the American consumer electronics products industry to which we have referred. The documents themselves, for the most part, are said to set forth accounts in a variety of forms of what transpired at the meetings of the various "conspiratorial groups," principally the so-called "Tenth Day Group," but including higher echelon groups as well.

Textually, the protocols, testimony and other writings indicate that there were meetings of Japanese consumer electronics products executives, and that at those meetings they discussed predictions of domestic demand, the establishment of domestic "bottom prices," *i.e.* minimum suggested retail sales prices, and appropriate domestic wholesale profit, retail profit, and "rebate" margins in the retail distribution chain. There are scattered references in the documents to "export," though, for the most part, the executives attending the meetings had no responsibility for export matters.

The protocols, which were prepared by JFTC investigators and signed by the witnesses, are straightforward, readily comprehensible, narrative statements. The testimony is similarly clear, and is developed through question and answer in a manner which is generally similar to that employed to develop testimony in the U.S. legal system.[6] The diaries and memoranda are another matter. The diaries all appear to have been written solely for the diarist, with the notations written in a kind of shorthand or code which the writer presumably himself can understand, but which no one else could fully understand except for occasional excerpts. As defendants correctly note, they are a "hodge podge" of notes in which the author has not explained with any degree of clarity what he meant, to what he was referring, or even where he was when he wrote them. While plaintiffs have clarified a few of the references in the diaries by cross reference to JFTC testimony or protocols, only an infinitesimal part has been thus explained. One would have to engage in the rankest of speculation to make sense out of the vast bulk of the diaries.

[6] As will be seen, however, portions of the protocols and testimony are not based on the witnesses' personal knowledge. Plaintiffs' and defendants' experts agree that the Japanese legal system does not exclude hearsay evidence in civil cases or in JFTC proceedings.

One cannot tell with any certainty where entries begin and end. There are many time gaps in the notebooks or diaries, and only a portion of the "conspiratorial meetings" otherwise demonstrated to have taken place are recorded in them. There are all kinds of arrows and innumerable symbols and notations and references which are unintelligible to the translators, who report those references as "illegible." Many of them are written in a code which only a cryptographer could solve.

There is both intrinsic and extrinsic evidence that many of the diary entries reflect occurrences at meetings which the diarists did not attend, but rather about which they were informed by others. The diaries plainly contain numerous instances of second and third level hearsay. Because of the manner in which the diaries are kept, however, it is not possible to sort out which entries are based upon the diarists' personal knowledge and which are based upon hearsay. There is no evidence of regular or continuous habit on the part of any of the diarists in making their notebook entries or checking them systematically. There is no evidence that the diaries were ever communicated (or intended to be communicated) to anyone else. Given this general description, it is obvious that the admissibility of the diaries would be in sharp dispute.

The evidentiary hearings focused only upon the important documents in the case. Some, including the diaries, were con-

sidered in enormous depth, in argument lasting hour after hour. During the course of argument, plaintiffs would advance many reasons why the particular document was authenticated, why it was a business record or an admission or a statement against interest, and so forth, referencing a host of matters in the voluminous record. The defendants would respond, and all would join in extensive colloquy with the court on each point.

Unlike our procedure in connection with the public records and reports, we did not address at the hearings matters of relevancy and its limits (F.R.E. Article IV). There are serious relevancy issues with respect to many of these documents; however, with one exception, we will defer relevancy considerations, including those under Rule 403, until our opinion on the summary judgment conspiracy motions.[7] We also defer until then the determination as to whether the plaintiffs have produced evidence *aliunde* of a conspiracy which would render their evidence admissible against coconspirators under Rule 801(d)(2)(E).[8]

The admissibility of the referenced JFTC materials has been fought on a number of battlegrounds. First, the defendants have challenged the authenticity of much of the proffered material, asserting that the plaintiffs have failed to meet their burden of establishing authentication under F.R.E. 901 and 902. Defendants urge that the notion of authentication does not implicate merely the genuineness of the subject document, but also involves additional layers of foundation. In order for a diary to be authenticated within the meaning of Rule 901, for

[7] We do consider the relevancy of plaintiffs' proffer of certain documents as non-assertive conduct or verbal acts under Rule 801(a)-(c), since this matter is closely linked to the admissibility of those documents under the hearsay rule and its exceptions.

[8] *See Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660 at 665 (3d Cir. 1980); *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); *United States* v. *Trowery*, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1977). *Cf. United States* v. *Cryan*, 490 F.Supp. 1234 (D.N.J. 1980).

example, defendants argue that plaintiffs must not only establish its genuineness, but also, to the extent that it is proffered as a faithful account of what transpired at meetings attended by the diarist, must establish personal knowledge by the diarist of the recorded events.

The remaining disputed issues relate to Article VIII of the FRE, the hearsay rules. The principal hearsay objection is defendants' contention that none of the diaries or memoranda are records of regularly conducted activity within F.R.E. 803(6), the "business records" exception to the hearsay rule. This contention is advanced in four aspects: (1) that plaintiffs have failed to qualify the materials as business records by the testimony of a "custodian or other qualified witness" as required by 803(6); (2) the documents do not meet the requirement that they were kept in the regular course of business and that it was the regular practice of the business to make the record; (3) the plaintiffs have failed to establish the "personal knowledge" required under 803(6); and (4) the materials are untrustworthy. Defendants characterize the diaries and memoranda as an unintelligible hodge podge of materials which inherently cannot qualify as business records, especially in the absence of a witness to explain them. Plaintiffs rejoin that a "custodian or other qualified witness" is not necessary and that they have adequately qualified the documents through circumstantial means, including analysis of the documents themselves, cross-validation by way of comparison with other documents, and the fact of production of the documents by defendants under F.R.Civ.P. 33(c) or 34.[9]

Alternatively, the plaintiffs seek admissibility of some of the diaries and memoranda under F.R.E. 801(d)(2)(B), (C) & (D)

[9] This latter contention is a subject of much dispute, and runs through the foundational aspect of the evidentiary problems. The plaintiffs virtually assert an estoppel against defendants to deny the authenticity or foundation for admissibility of documents by virtue of certain interrogatory answers. The defendants respond that under the Federal Rules of Civil Procedure, their broad production of documents carries with it none of the consequences claimed by plaintiffs.

as admissions against the company which employed the declarant. In each such instance, defendants object that the requisite foundation has not been laid on the grounds that the requirements of subsections (B), (C) & (D) have not been met. Moreover, admission of the diaries is resisted on the grounds that in each case they were not communicated to anyone within or outside the company and hence do not qualify under the rules for authorized or vicarious admissions. Defendants also argue that the diaries do not constitute "assertions" within the meaning of Rule 801(a), hence cannot be admissions, and that they cannot in any event qualify as admissions because they are rambling, conjectural, and suppositious statements, rather than specific, clear, and concise ones.

Plaintiffs also seek admission of the diaries and memoranda under Rule 803(1), as present sense impressions, under Rule 803(5) as recorded recollection, and under 803(24) and 804(b)(5), the residual or "catchall" exceptions, on the grounds of their supposed truthworthiness. They apparently also assert them to be statements against interest under 804(b)(3). The defendants deny the applicability of 803(1) and 804(b)(3) to the diaries for a variety of reasons, substantive and foundational. Defendants also argue that the foundational requirements of the residual exceptions are not met (or have been waived) because of plaintiffs' failure to try to secure equally or more probative evidence by other reasonable means (*i.e.* depositions of the diarists and memo writers). They further assert that the materials lack the circumstantial guarantees of trustworthiness required by 803(24) and 804(b)(5). Finally, they argue that the residual exceptions are not intended to be available in situations otherwise provided for by the rules, an argument which they dub the "near miss" doctrine.[10]

The protocols are said by plaintiffs to be admissible as statements against interest under F.R.E. 804(b)(3), under the residual exceptions, and as admissions of a party opponent under 801(d)(2)(C) and (D). Plaintiffs' reliance on F.R.E. 804(b)(3) requires a showing under 804(a) of unavailability of the declarant. While there is no dispute as to Mr. Yajima's unavailability, since he died in 1968, defendants strongly contend that all of the other declarants are available because, under 804(a)(5), their attendance or testimony could easily have been procured. More specifically, defendants represent that virtually all of the diarists and persons who attended the alleged conspiratorial meetings are alive and well and still employed by their respective companies and that they have been available for discovery or trial depositions for years.

Defendants also contend that the requirements of 804(b)(3) are not met because the statements and testimony given in the JFTC proceeding were not against the pecuniary or proprietary interest of any witness whose statement of testimony is proffered, much less "so far" contrary to his interest, or "so far" subjecting him to civil or criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true, the requirement of Rule 804(b)(3). They also assert that plaintiffs have advanced no evidence of *consciousness* of contrariety to interest, another requirement of 804(b)(3). Defendants add that even if the witnesses' statements tended to subject their employers to civil or criminal liability, the posture of the employers does not matter for Rule 804(b)(3) purposes.

The JFTC transcripts are said to be admissible as former testimony under 804(b)(1), as well as under 804(b)(3) and (5) and 801(d)(2). Defendants object to the introduction of the JFTC testimony mainly on the grounds that they did not have a similar motive to develop the testimony by direct, cross, or redirect examination as is required by Rule 804(b)(1), since the issues in that case were very different from this one. The defendants also object to admission of the testimony under the other hearsay exceptions for the reasons already stated with respect to the protocols and diaries.

[10] The questions relative to various memoranda and "minutes of meetings" produced in discovery are similar to those affecting the diaries, and we do not treat these other documents separately in the Preliminary Statement.

Defendants argue that neither the protocols nor the testimony are admissions because the persons making them were neither authorized to make a statement concerning the subject, nor were the statements made concerning a matter within the scope of their agency or employment. Finally, defendants oppose the notion that the residual hearsay exceptions are available in these circumstances. First they invoke the so-called "near-miss" doctrine under which the residual exception cannot be invoked if the proffered hearsay fits within the framework but fails to qualify under a specific hearsay exception. Second, they challenge the trustworthiness of these materials. Third, they assert that more probative evidence could have been procured by reasonable efforts.

In connection with each of our determinations, whether under the authentication rules or the hearsay rules, we must determine whether admissible evidence is required to support the factual findings which are the underpinnings of the ruling on the admissibility of the evidence proffered. Rule 104(a) provides that in making determinations of preliminary questions concerning the admissibility of evidence, the court is not bound by the Rules of Evidence, except with respect to privileges. Under Rule 104(b), entitled "Conditional Relevancy," however, the jury rather than the court makes the ultimate determination of admissibility, hence admissible evidence is required. The parties dispute the need for admissible evidence in the qualification process not just in connection with authentication, but also at the subsequent levels, *e.g.* qualification as a business record. The plaintiffs argue that admissible evidence is not required in the qualification process, relying principally on 104(a), while the defendants maintain that it is.[11]

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[11] A related question which surfaced in the dialogue over business records is whether, if something is qualified as a business record as against one defendant, it is thus qualified as against all. Put differently, and to paraphrase Gertrude Stein, is it the case that "a business record is a business record is a business record," or must the record be qualified as against each defendant? The answer to this question of course turns on whether admissible evidence is required under Rule 104.

The foregoing is a catalog of the more significant legal questions which have arisen during the course of our hearings over the JFTC and cognate materials. As we have noted, similar questions have arisen in connection with the materials produced in discovery in connection with import transactions. Still other interesting legal questions have arisen which we shall enumerate as we proceed through our discussion. Because virtually all of these questions have been raised with respect to each document, the discussion of each will perforce be many layered, though we hope not labyrinthine.

We have observed about the diaries the difficulty that anyone other than the diarist would have in understanding them. It is of course obvious that there are indeed persons who could eliminate that difficulty and decipher any code—like references in any diary: either the diarist himself, or, in his absence, someone present at the meeting whose proceedings are supposedly recorded in the diary, or someone contemporaneously familiar with the content of the diary or memo and the diarist's recording practices. However, the plaintiffs, despite their role as proponents of the documents, hence bearers of the burden to qualify them, have not proffered the testimony in any form of any such person. Moreover, they have made it clear that they have no intention of doing so, before or at trial. Rather, they prefer to qualify the documents circumstantially and to offer selected (though voluminous) excerpts therefrom in connection with the summary judgment motions and at trial.

The litigation strategy we have described is not our supposition, but rather the plaintiffs' clear statement. Edwin P. Rome, Esquire, plaintiffs' lead counsel, has confirmed the strategy again and again. For instance, he noted during the course of the evidentiary hearings:

> I assume personally, Your Honor, whatever onus there may be about the fact that we chose quite deliberately, and I state it of record, we chose quite deliberately not to undertake to depose persons in a foreign language when we had documents that in our view documented and explicated a conspiracy to violate American law.

PTO 268 at 143-44 (June 27, 1980). There are numerous similar statements by Mr. Rome in the voluminous pretrial record in this case.[12]

This litigation strategy was maintained in the face of repeated warning from the defendants that they intended to challenge the admissibility of the diaries, memoranda, protocols, and testimony. This warning came not only during the course of our numerous pretrial conferences, but even in Melco's motion for summary judgment, filed April 1978, well before the close of discovery. In that motion, Melco spent many pages detailing the kinds of evidentiary foundational deficiencies we deal with herein. Yet the plaintiffs, all the while insisting they were ready for trial, declined to take depositions of those who might shed light upon the documents. For example, at the pretrial conference of June 14, 1978, six months before the close of plaintiffs' discovery period, plaintiffs' counsel stated to the Court:

> MR. McELROY: We said a long time ago, and Ed Rome has repeated throughout, that the plaintiffs in this case are ready to go to trial upon reasonable advance notice. We believe that discovery in the case to date is sufficient for us to get to a jury and to get a verdict. Likewise, we believe that, and it follows, that we believe we have had enough discovery, we have enough evidence to defeat a motion for summary judgment. We don't need further discovery in order to respond to [Melco's counsel] Mr. Reath's motion.

PTO 107 at 21.

Indeed, the plaintiffs were challenged on several occasions by the Court as to why, having proceeded with this case for close to a decade, and having inspected literally millions of

[12] We note that plaintiffs' strategy does not reflect sloth or any lack of experience on the part of plaintiffs' counsel. Plaintiffs' lead counsel, Edwin P. Rome, is one of the ablest antitrust lawyers in the United States. A brilliant and eloquent advocate, Mr. Rome tried some of the pioneering antitrust cases in the motion picture industry and has assembled a stellar litigation team whose efforts have been prodigious, as well as of the highest quality.

documents, they had failed to take depositions for the purpose of laying foundation for the admissibility of the challenged JFTC materials.[13] It was pointed out that such foundational depositions are regular fare in complex cases, *i.e.*, it is the custom for counsel to take them.[14] Mr. Rome consistently responded that it was his considered decision not to do so. The plaintiffs did take depositions of some Japanese executives in connection with the motions relative to personal jurisdiction and venue.[15] That foundational (or substantive) depositions of Japanese executives were feasible is demonstrated by the repeated and uncontroverted representations of defense counsel that, with the exception of Mr. Yajima who died in 1968, all of the diarists and all persons whose names were focused upon during the evidentiary hearings are alive and well in Japan, still employed by their companies, and that they have been available for depositions for many years.

It is important to note that our observations about plaintiffs' strategy are not merely retrospective, for it is clear that plaintiffs intend to call no witnesses from Japan to lay foundation for admissibility at trial either. Not only have they so conceded,

[13] We also sharply questioned plaintiffs as to why, given the magnitude of their claims and the existence of so much fodder for examination, they had failed to take depositions, for substantive purposes, of a single Japanese executive who attended any of the allegedly conspiratorial meetings which are at the core of the plaintiffs' case. We noted that we found it difficult to conceive of counsel pursuing that strategy in a case with purely U.S. roots.

[14] Defendants have taken them in this very case. For another example see the pretrial order governing non-party discovery in the Uranium Antitrust Litigation, which makes specific reference to "depositions . . . taken solely for the limited purpose of . . . authenticating documents produced by such non-party." Joint Pretrial Order No. 8 at 2-3, *In Re Uranium Antitrust Litigation*, M.D.L. 342 (N.D. Ill. Nov. 13, 1979).

[15] Although plaintiffs have occasionally complained about the cost and cumbersomeness (due to translation problems) of taking depositions in Japan in the Japanese language, they have abandoned any reliance upon such problems as their rationale for not taking depositions. They concede, as they must, that given the magnitude of the litigation they have instituted and maintained, cost factors provide no excuse. PTO 268 at p. 143.

but had they intended to do so they would have been obliged to list those witnesses in their preclusive F.P.S., which they have not done.

The defendants' explanation for plaintiffs' litigation strategy is not gentle. They state it in their "Memorandum of Certain Defendants in Support of their Position that Materials from the JFTC Proceeding Are Not Admissible in Evidence" (pp. 3-4) as follows:

> Indeed, it seems clear that it was precisely because the Japanese materials do not constitute records of the only two matters that could make them properly probative in this case, that plaintiffs chose not to follow the normal route of taking depositions to lay a proper foundation for their introduction. Plaintiffs knew that such depositions would not be helpful to their case and that, at the end of such discovery, while they might have come up with admissible evidence regarding discussions of "bottom prices" by six companies for two years (1965-1966), they would not come up with any admissible evidence of the creation of a U.S. export invasion fund or of a United States predatory price agreement. They, therefore, seized upon the ploy of attempting to introduce the materials without proper foundations—and without any opportunity by the other side to cross examine—and arguing to the jury that all kinds of wild inferences can be drawn from a handful of cryptic and basically incomprehensible "export references" found in materials which were obviously not written to record export activities. Since plaintiffs' direct case will last for some months, the jury will be hopelessly prejudiced by such tactics before the first of the defendants could even be heard.
>
> In furtherance of this approach, plaintiffs adopted the tactic of piling into the FPS hundreds of thousands of Materials and spuriously arguing that they are all evidence of conspiracy, so that they could create the argument that it would be extremely burdensome for them to lay foundations in the normal way, even though their PPTM and summary judgment briefs show that they are, in fact, relying on a relatively small number of such Japanese materials.

Defendants conclude with a little homily:

> Fortunately, as we will demonstrate below, our Rules and evidentiary precedents, which are rooted in basic fairness and due process, do not allow for such a result. Evidence must be shown—through the establishment of a foundation in prescribed ways—to be proper and reliable before it can be thrown before a jury and begin to affect that jury's mind.

Of course, the legal aspect of their homily is quite correctly stated. And while we do not endorse defendants' rhetoric, we do note that we find a kernel of truth in defendants' evaluation of plaintiff's litigation strategy.

The volume of material before us for consideration is staggering. We refer not only to the large number of documents (and the large volume of document pages), but also the extensive briefs and other submissions of the parties. It was represented to us during the hearings that, at that juncture, some 85 or more lawyers and paralegals were working close to full time on the case (75 for the defendants). Scores of memoranda relating to admissibility were filed during the hearings, and it is difficult to digest all of that material so as to write a worthy opinion. We shall do our best.

Because the plaintiffs have not produced the conventional evidentiary foundation, *i.e.* testimony of a custodian or other qualified witness, it is necessary that we evaluate the subject documents on the basis of the circumstantial factors called to our attention by plaintiffs' counsel at our evidentiary hearings. Doing so will be a tedious process, requiring us, in the case of each document, to review plaintiffs' foundation and defendants' response and then to apply the applicable legal standards to determine admissibility. We are aided materially in this regard by the post-hearing submissions of the parties which summarize the plaintiffs' foundation and defendants' response on each document, and we draw heavily upon those submissions. After a point there will be some degree of repetition in the factual patterns, enabling us to simply incorporate earlier discussion by reference. However, because of the importance plaintiffs attributed to each of the critical documents taken up in this opinion, we cannot, in fairness, unduly trun-

cate or abbreviate our description of plaintiffs' foundational proffer or defendants' response. All of this makes for a very long opinion for which we apologize but which we cannot avoid. This is because of our obligation to the parties in this very important case to which they have devoted so much time and expense, and also to the Court of Appeals which will ultimately review it and will need a full statement of the reasons for our major rulings.

For the variety of reasons which follow, we conclude that neither the diaries, memoranda or "minutes of meetings" nor discrete portions thereof are admissible in evidence; that the JFTC testimony is admissible against the defendants in the Six Company Case only, except for any so-called "export" and war-chesting "references," which are, with minor exceptions, inadmissible; and that the protocols are admissible against the employer of the maker of the protocol.

In terms of opinion structure, we shall follow the same course here as we did in the first opinion in this series. In Part II, we shall set out the legal principles applicable to the evidentiary questions we must decide, resolving the disputes between plaintiffs and defendants on legal issues. We shall take up all of the sections of the F.R.E. claimed by the parties to have bearing upon whether any of the documents were authenticated or admissible under one of the exceptions to the hearsay rules. As will be seen, there is hardly a section or subsection of Article VIII (hearsay) or Article IX (authentication) of the F.R.E. that escaped their advocacy. The number of rules invoked is largely a function of plaintiffs' circumstantial mode of laying foundation, as opposed to doing so by direct testimony. Because of these myriad issues and the fact that some of them are of first impression, this discussion will be extremely detailed. Then, in Part III, we shall describe the documents at issue and then apply the legal principles to the documents, determining their admissibility *vel non*. Fortunately, the breadth of the Part II discussion will cut "across the board" and will obviate the necessity for further legal discussion in Part III.

II. *Rulings on Contested Legal Issues Concerning Interpretation of the Federal Rules of Evidence*

A. *Authentication*

The requirements for authenticating documents are set forth in Article IX of the F.R.E. The general provisions of Rule 901(a) provide:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

1. *The Standard for a Preliminary Ruling on Authentication Under Rule 104; Will Inadmissible Evidence Suffice?*

Plaintiffs and defendants differ as to whether admissible evidence is necessary to authenticate evidence. Defendants say "yes" and plaintiffs say "no." We begin with the Advisory Committee's Note to Rule 901, which states expressly that the requirement of showing authentication falls in the category of "relevancy dependent upon fulfillment of a condition of fact," and is thus governed by the procedure set forth in Rule 104(b), and not that set forth in Rule 104(a). Rule 104, titled "Preliminary Questions," provides in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. . . .
>
> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

The Advisory Committee Note to Rule 104(b) makes plain that preliminary questions of *conditional relevancy* are not determined solely by the judge, for to do so would greatly restrict the function of the jury as the trier of fact. If, for instance, there were serious questions in this case as to whether Mr. Yajima's diary was a forgery, it is obvious that a question of evidence so critical could not be decided solely by the court. Under the aegis of rule 104(b), the judge makes a preliminary determination whether the foundation evidence is sufficient to permit a factfinder to conclude that the condition in question has been fulfilled. If so, according to the Advisory Committee Note:

> . . . the item is admitted. If after all of the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

In *United States* v. *Goichman*, 547 F.2d 778, 784 (3d Cir. 1976), the Court of Appeals formulated this principle as follows:

> [T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility.

Thus, once a *prima facie* showing has been made to the court that a document is what its proponent claims, it should be admitted. At that point the burden of going forward with respect to authentication shifts to the opponent to rebut the *prima facie* showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document.[16] The required *prima facie* showing of authentica-

[16] Much is made by the plaintiffs of the fact that defendants, despite he "hard line" taken by some of them on matters of authentication, have not come forward with any evidence to refute plaintiffs' showing with respect to various documents. It is in fact true that defendants have come forward with no evidence countering plaintiffs' claim of authentication of the various documents. However, that does not alter the plaintiffs' burden.

tion need not consist of a preponderance of the evidence. Rather, all that is required is substantial evidence from which the trier of fact might conclude that a document is authentic. As the court in *Goichman, supra*, stated:

> [I]t is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been *substantial evidence* from which they could infer that the document was authentic.

Id. (emphasis added).[17]

The plaintiffs contend that in determining whether an adequate *prima facie* showing has been made, the court may consider inadmissible evidence. We disagree. Under Rule 104(b), authentication must be established by the "introduction of evidence." By using this language, the Rule plainly contemplates that the jury's determination of authenticity will be made only on the basis of admissible evidence. We find nothing in either Rule 104 or the Advisory Committee Notes to suggest that the jury may consider inadmissible evidence in this regard, except to the extent that evidence may be admitted "subject to" the introduction of subsequent (admissible) evidence of its authenticity.

So then, while the court's power to "consider" inadmissible evidence under Rule 104(a) is clear, the substantive determination which the court is required to make on the issue of authenticaton is whether *admissible* evidence exists which is sufficient to support a jury finding of authenticity. For it would be a pointless exercise for a judge to rely upon inadmissible evidence to fulfill the substantial evidence requirement when the trier of fact can only consider *admissible* evi-

[17] Although the defendants have offered no evidence to rebut the authenticity of the documents, we need not consider any such evidence at the preliminary stage. The substantial evidence standard, unlike a preponderance standard, requires no balancing of the evidence. The Court must only conclude that a prima facie showing has been made in order to admit the documents. It is for the trier of fact to consider the rebuttal evidence and balance it against the authenticating evidence in order to arrive at a final determination on authentication.

dence that a proffered document is authentic.[18] Accordingly, we hold that under Rule 104(a), Rule 104(b), and *Goichman*, our task in ruling on authenticity is limited to determining whether there is *substantial admissible evidence* to support a finding of authentication by the trier of fact.[19]

Since only admissible evidence can form the basis for the determination of authentication, the degree to which plaintiffs rely on using some of the documents they have submitted to authenticate other documents creates problems of circularity, and in some cases it is more logical to determine other aspects of admissibility before reaching the 901 determination. This will be considered *infra* with regard to specific categories of documents.

2. *The Notion of Authentication and the Scope of Rule 901(a); is Authenticity More Than Mere Genuineness?*

Another important issue addressed in argument and briefs is the intended scope of Rule 901(a) and, in particular, the meaning of the last phrase which defines authentication as a finding "that the matter in question is what its proponent claims." In contrast to the position of the plaintiffs, who equate authentication with genuineness, the defendants contend that the scope of authentication is determined by the claims made by the proponent of a document and encompasses all of what the proponent "*must* claim it is in order to use it as he wishes to"[20] (emphasis in original). They argue that the subject documents' "logical status as evidence, and hence their authenticity, could be established only by showing that they are accurate and reliable accounts. . ."[21] (of the allegedly conspiratorial meetings reported), otherwise "they are not probative"[22] and thus not what their proponent claims. Since authentication is but a "special aspect of relevancy," Advisory Committee Note to Rule 901(a), this is an appealing argument. After all, the plaintiffs claim that Yajima's diary should be admitted to portray the agreements made at certain meetings. What does it matter then that the diary is not a forgery, if it is not an accurate and reliable account of what transpired at the meetings Yajima purported to record?

[18] Weinstein notes in his discussion of Rule 901 that:

> since the jury will not be able to evaluate the authenticity of a document unless it has admissible testimony before it, the court should consider whether the jury could find the document authentic before it admits it on the basis of inadmissible evidence.

5 Weinstein's Evidence 901(b)(1)[01] at 901 22 (1978) [hereinafter cited as "Weinstein"].

[19] As a corollary of this holding, we acknowledge that some documents may be authenticated only as against certain parties, since the authenticating evidence for those documents may be admissible only against certain parties.

[20] Defendants' Memorandum Concerning Admissibility Under Fed.R.Evid. 104 and Fed.R.Evid. 901, p. 3.

The problem with defendants' argument is that it reads the language of 901 to subsume nearly all of the issues involved in many cases in which the issue may arise. For example, the proponent claims that many of the documents under consideration here are "business records." As the Advisory Committee Notes to 901 make clear, however, this is a completely separate determination which must be addressed outside the scope of the authentication inquiry.[23] While the Advisory Committee Notes state specifically that authentication is an aspect of conditional relevancy, they are also quite clear that it is but one kind of conditional relevancy,[24] and does not subsume all of the evidentiary foundation which must be established in order to show that a document is relevant evidence:

> Authentication and identification represent a *special aspect* of relevancy. Thus a telephone conversation may be

[21] *Id.* p. 4.

[22] *Id.* p. 6.

[23] Plaintiffs also claim that the documents establish the existence of a conspiracy, an issue certainly not reached in the authentication determination.

[24] The Advisory Committee Notes to Rules 602 and 1008 state, for example, that a witness's personal knowledge of a matter under 602 or matters of other evidence of contents of writings, documents or photographs under Rule 1008(a), (b) and (c), are also questions of conditional relevancy.

> irrelevant because on an unrelated topic or because the speaker is not identified. The *latter aspect* is the one here involved.[25]

(emphasis added) (citations omitted).

The specific illustrations under subsection (b) further support a narrow interpretation of authentication. For example, authentication can be established by expert or nonexpert opinion on handwriting, F.R.E. 901(b)(2), a method which would do nothing to establish a document as the "accurate and reliable account" that defendants claim it must be in order to authenticate it.

While, as defendants urge, different showings are required in accordance with the *type* of evidence presented, in all of the cases and examples which they have cited authentication involves establishing the origin or authorship of an item, or the connection of an item to a particular individual or party.[26] In *Rhoads* v. *Virginia-Florida Corporation*, 476 F.2d 82 (5th Cir. 1973), upon which defendants place their strongest reliance, the authenticity of the drawings at issue had been conceded by the opposing party. The court there pointed out that:

> authentication of the documents *merely established* their authorship, the proof of some human's "personal connection with a corporal object." 7 Wigmore On Evidence § 2129, at 564 (3d ed. 1940).

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[25] Advisory Committee Notes to Rule 901(a).

[26] *Medley* v. *United States*, 155 F.2d 857 (D.C. Cir.) *cert. denied*, 328 U.S. 873, 66 S.Ct. 1377, 90 L.Ed. 1642 (1946), cited by the defendants, does not even mention authentication, and contains no consideration of the issues involved here. Similarly there is no mention or indication that authentication is an issue in *Lathrop* v. *Henkels & McCoy, Inc.*, 351 F.Supp. 1052 (E.D.Pa.1972). *Coughlin* v. *Capital Cement Co.*, 571 F.2d 290 (5th Cir. 1978), cited by defendants, is an example of a case explicitly decided on the basis of the requirements of 803(6), but using the term "authentication" to refer to the foundation requirements under that rule. We feel that it is better practice, in order to avoid semantic confusion, to confine the use of the term "authentication" to requirements under rule 901.

476 F.2d at 85 (emphasis added). The court then proceeded to discuss additional requirements for admissibility and suggested that the drawings must either be "verified" by testimony of a witness, citing 3 Wigmore On Evidence § 790, at 218, or must qualify as an exception to the hearsay rule.[27] As we have noted *supra*, a finding of authentication does not establish admissibility, and any other applicable requirements must also be met.

We conclude that, notwithstanding the apparent sweep of 901, created by its use of a rather expansive location, *i.e.*, the prescription that authentication is satisfied by evidence sufficient to support a finding that the matter in question is "what its proponent claims," the notion of authentication is a narrow one, akin to the notion of genuineness. The other foundation requirements should not be simply subsumed under the authenticity terminology, but should remain analytically distinct. We find other support for this conclusion. First, the Advisory Committee Note, subdivison (a) provides:

> Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least *prima facie genuine* items of the kind treated in Rule 902, *infra*.

(emphasis added). Moreover, a review of the annotations under Rule 901 confirms this view, for the cases discussing the Rule have a similarly limited scope. *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 651-52 (1977) and 245-47 (1980 supp.) [hereinafter cited as "Saltzburg"]. Thus such foundation issues as personal knowledge of the declarant, which defendants urge us to treat as authentication issues, will be dealt with separately under the appropriate rules.

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[27] The court in *Rhoads* concluded that since the proffered drawings did not qualify as either official written statements or as business records they had been properly excluded, 476 F.2d at 86.

3. *Methods of Authentication*

Rule 901(b) lists several examples of methods of authentication which would meet the requirements of 901(a).[28] The

[28] Rule 901(b):

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witnesses.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Advisory Committee Notes for this subsection state that these examples are not intended to exhaust all the possibilities, "but are meant to guide and suggest, leaving room for growth and development in this area of the law."

In their endeavors to authenticate the matters before us, the plaintiffs place primary emphasis on 901(b)(4), Distinctive Characteristics. They also assert, however, that the testimony and protocols from the JFTC proceedings may provide evidence of authenticity under 901(b)(1) (Testimony of a Witness with Knowledge), and that since some of the documents fall just short of the age requirements under 901(b)(8) (Ancient Documents), this subsection in conjunction with other circumstances would be sufficient to fulfill the 901(a) requirements. Once authenticity has been established for one document, 901(b)(3) may be used to authenticate other documents of a similar type.

Rule 903 (Subscribing Witness' Testimony Unnecessary) and the illustrations given under 901(b) make it clear that *testimony* is not essential to establish authenticity, and, as McCormick states, "authentication by circumstantial evidence is uniformly recognized as permissible."[29] Elements which tend to establish authenticity may be found both in Rule 901 itself, in the Advisory Committee Notes, and in the cases which we will outline in the following discussion. One such element is the source of a particular document, *i.e.*, the method or place of its discovery.

a. *Source of the Document*

Plaintiffs urge that the defendants' production of certain of the documents in answer to interrogatories under Rule 33(c) is

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

[29] McCormick's Handbook on the Law of Evidence § 222 (2d ed. 1972) [hereinafter cited as "McCormick"]. See also *United States* v. *Natale*, 526 F.2d 1160 at 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976); *United States* v. *Smith*, 609 F.2d 1294, 1301 (9th Cir. 1979).

itself sufficient to establish them *ipso facto* as authentic. We disagree with this reading of the Rule.[30] Given the breadth of the discovery rules and the broad requirements for production, we feel it would undermine the liberal intent of the those rules to interpret such production as an admission of authenticity in the absence of a specific assertion by the producing party regarding the nature or authorship of the documents produced.

The production of the documents by the defendants may, however, provide circumstantial evidence of authenticity. McCormick notes that a *prima facie* showing of authenticity is made by the emergence of a document from public custody. He concludes that, while the circumstances of private custody are too varied to warrant an expansion of the rule in every case, "proof of private custody, together with other circumstances, is frequently strong circumstantial evidence of authenticity."[31]

In *Alexander Dawson, Inc.* v. *N.L.R.B.*, 586 F.2d 1300 (9th Cir. 1978), the Ninth Circuit upheld the decision of an administrative law judge admitting job application forms even though there had been no testimony regarding who had filled out the particular applications, and no witness could testify to a specific chain of custody. The circumstances surrounding their dis-

[30] We discuss this point more extensively at p. 1236, *infra*, in connection with the "business records" aspect of this opinion.

[31] McCormick § 224 at 552. McCormick cites *United States* v. *Imperial Chemical Ind.*, 100 F.Supp. 504 (S.D.N.Y.1951), an anti-trust case where two unsigned documents were admitted. Though there was no proof of their authorship, they were from defendant's files, the subject matter was corroborated by other evidence, and the documents gave indications that they were prepared by responsible agents of defendant. The court stated that:

> [i]ndeed, the only logical explanation of their appearance in the ICI files if they are not authentic, is that the documents are forgeries, or spurious. Such an explanation is rejected as entirely improbable.
> However, the weight to be given the documents, particularly to the second, is necessarily decreased. While they bear every indication that they were prepared by persons in a position to know of the matters set down, their anonymity must go to the weight to be given them. With this caveat, the two documents will be received.

covery,[32] considered along with their contents[33] was held adequate to authenticate the forms. In *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976), a notebook that had been seized during the defendants' arrest for extortion was admitted at trial. The Court of Appeals enumerated among the facts supporting its authenticity: (1) the presence of the defendants at the office where the notebook was discovered; (2) that defendants had held numerous meetings with a witness in that office; and (3) that one of the defendants admitted that the office was his. This, together with evidence supplied by the notebook's contents, *see infra*, was sufficient to allow its admission into evidence.[34] We will follow the *Dawson* and *Natale* courts by treating the circumstances of their production as one element of circumstantial evidence which tends to authenticate the documents produced by the defendants.

b. *Characteristics of the Document Itself*

The characteristics of the document itself are also a basis for establishing authentication, Rule 901(b)(4). The last phrase of the rule indicates, however, that characteristics of a document must be considered "in conjunction with circumstances." Although Weinstein states that a document "can be authenticated by its contents alone," it is clear, from the examples used, that he "means in light of surrounding circumstances." ¶ 901(b)(4)[01] at 901-46. All of the characteristics mentioned in 901(b)(4) are also subject to the overriding requirement of "distinctiveness" under that example.

The first characteristic mentioned in 901(b)(4) is "appearance." Weinstein gives as examples of the types of appearance

[32] Applications had been taken from the company's premises by two employees (without authority) and given to the union, who in turn gave them to the General Counsel for the N.L.R.B.

[33] Discussed *infra*.

[34] See also *United States* v. *Zink*, 5 F.Evid.Rep. 1131, 612 F.2d 511 (10th Cir. 1980); *United States* v. *King*, 472 F.2d 1 (9th Cir.), *cert. denied*, 414 U.S. 864, 94 S.Ct. 37, 38 L.Ed.2d 84 (1973).

the courts may wish to consider: a postmark, a return address, a letterhead, a signature even where affixed by a rubber stamp, typing or form which corresponds to usual practice.[35] The aspect of the document's appearance which is most relevant with respect to the JFTC documents is the fact that many of them are marked with a particular person's name in the form of a "chop," a Japanese seal which contains a stylized rendition of a person's name and is sometimes used in lieu of a signature. During the discussion of authenticity of the so-called MITI statement,[36] proffered by defendants, they urged that the "chop" affixed to the document made it in the legal equivalent of a signed document. Though this contention was resisted at that time by plaintiffs, we conclude that a "chop" should be given weight equivalent to a signature. We recognize that a "chop," like a signature, may not always be genuine. Furthermore, many people with the same surname may have a common "chop," hence the "chop" does not in every case indicate authorship. The particular use of a "chop" will be considered with respect to the individual document upon which it appears. Many of the import transaction documents also have distinguishing characteristics, particularly letterheads.

A second characteristic mentioned in 901(b)(4), again subject to the distinctiveness requirement, is the contents, or substance, of the document. Contents have been used to establish authentication in a variety of ways. In *United States* v. *Smith*, 609 F.2d 1294 (9th Cir. 1979), hotel records of defendant's registration and charges incurred were introduced. Included in the evidence linking the defendant to the records were independent corroboration of his presence at meetings in the hotel, the use of names used by defendant in signing records, and the use of the address which appeared on defendant's

[35] Weinstein, 901(b)(4)[02], 901 51 through 901 54.

[36] The "MITI Statement" is a document which was transmitted to the court by the Japanese Ministry of International Trade and Industry ("MITI") via diplomatic channels. The defendants urge that it supports their "sovereign compulsion" defense, an aspect of the summary judgment motions which we have not yet decided.

business card.[37] In *Natale, supra*, the court similarly relied upon the corroboration of the contents of the notebook involved by independent evidence. One of the entries referred to a loan made to a witness in the case, and served to authenticate the document.

In *Goichman, supra*, 547 F.2d at 783, an unsigned document entitled "History of Children's Assets," which listed the defendants' expenditures, had been produced as part of the docket record in a prior (domestic relations) proceeding. The contents of the document were corroborated by defendant's complaint in that proceeding, and the words "I" and "my" were used in conjunction with the first names of the defendant's three children. The Third Circuit held that this evidence of contents was sufficient to establish a prima facie showing of authentication.

If the subject matter of a document refers to knowledge which only one individual would have had, it is sufficient to authenticate the document. 7 Wigmore on Evidence § 2148 (3d ed. 1940). Weinstein disagrees with the insistence on knowledge by only a single person, however, as he states, "the force of the inference decreases as the number of people who know the details . . . increases." Weinstein, ¶ 901(b)(4)[01] at 901-46 and 47. In *United States* v. *Wilson*, 532 F.2d 641 (8th Cir.), *cert. denied*, 429 U.S. 846, 97 S.Ct. 128, 50 L.Ed.2d 117 (1976), the prosecution sought to introduce a notebook which contained records of drug transactions. Though it was admitted that the author was unknown, the Court of Appeals upheld the authentication of the notebook on the grounds that only those persons acquainted with the particular transactions involved could have written the entries.[38]

Some of the documents involved are said to contain information allegedly known only to a limited number of individuals

[37] The court in *Smith* noted that the objections concerning the identity or competency of the individual who prepared the records were relevant to evidentiary weight or credibility, but not to authenticity.

[38] The activities were characterized by a "code" and the writer used "nicknames" of individuals involved in the conspiracy. 532 F.2d at 645.

who attended various meetings. The plaintiffs' own showing demonstrates that the number was not all that limited. However, to the extent that information contained in documents is corroborated by other admissible evidence, and is known to a limited number of individuals, these factors may be considered in determining whether sufficient evidence exists to authenticate it.

c. *Testimony and Interrogatory Answers*

Testimony before the JFTC, to the extent that it is found admissible, may also be used to authenticate other documents. Rule 901(b)(1) specifically holds testimony sufficient to establish authenticity. Where the testimony does not deal directly with any particular document offered, it may still be helpful in proving authenticity circumstantially. Weinstein ¶ 901(b)(1)[01] at 901-22.[39] We will have occasion below to consider JFTC testimony both as circumstantial and as direct evidence of authenticity.

The answers to interrogatories may also be considered as "testimony" where they directly identify a document's source or author, corroborate the contents of particular documents, indicate the presence of a purported author at a meeting or a meeting's limited attendance, or otherwise establish the document's authenticity. While Weinstein notes that Interrogatories, Requests for Admissions and Stipulations "should be relied upon to dispose of most authentication problems before trial," ¶ 901(b)(2)[01] at 901-23, the questions and answers in most of the interrogatories here are not specific enough to constitute a concession of authenticity.

Since we have ruled that documents must be authenticated by admissible evidence, the admissibility of former testimony and the interrogatory answers themselves is an additional issue to be determined. Since the interrogatories may not be

[39] Weinstein states that "[t]he witness's testimony need not, in and of itself, suffice to authenticate . . ." but should, however, be considered "so long as it is relevant on the issue of identification."

admissible against all defendants unless the plaintiffs' conspiracy theory is accepted, this presents a particularly difficult situation.[40] Where authentication depends on the admissibility of an interrogatory, which itself depends on the plaintiffs' establishment of a conspiracy, the documents may be admitted "subject to" such a showing.

d. *Similarity to Other Authenticated Documents*

The example in 901(b)(3) allows the trier of fact to compare a document to another authenticated document in order to establish its authentication. In *Dawson, supra*, the employment applications involved were "on the same form" as applications whose authenticity was conceded. This, in conjunction with the circumstances of production, was considered sufficient to establish their authenticity, 586 F.2d at 1303. Many of the documents involved here are members of "groups" of documents, sharing similar characteristcs. The authentication of one such document may serve as the basis for authenticating the others in a group on the basis of comparison, initially by the court, and ultimately by the trier of fact.

e. *Age of the Document*

A final element to be considered in our determination of authenticity is the age of the document. Rule 901(b)(8)(C) sets twenty years as the age requirement for "Ancient Documents." None of the documents now before us is twenty years old, although some may reach that age by the time of trial.[41] While Weinstein urges that this figure should not be regarded as an absolute necessity,[42] it is itself ten years shorter than the

[40] Under F.R.E. 801(c), an interrogatory answer is hearsay except as to the party furnishing the answer, as to whom it is not hearsay under Rule 801(d)(2). While a deposition by written questions under F.R.Civ.P. 31 may be used against all parties present or represented or with reasonable notice, under F.R.Civ.P. 32(a), no such depositions were taken here.

[41] It should be noted, however, that the twenty year age period for a document is dated from "the time it is offered" according to 901(b)(8).

[42] Weinstein 901(b)(8)[01] at 901 101.

period under common law.[43] This is explained in the Advisory Committee Notes as being due to a shift in the underlying rationale for the rule from an emphasis on the unavailability of witnesses to an emphasis on the unlikeliness of a fraud over such an extended time perid. While the Notes state that any time period is bound to be arbitrary, we feel that in the present case some additional indicia of authenticity are needed where all of the documents fall short of the twenty year limit.

4. *Self-Authentication Under Rule 902*

Rule 902 provides that certain documents are "self-authenticating" to the extent that no extrinsic evidence of authenticity is needed. Although 902(3) lists Foreign Public Documents as being of this type, the Advisory Committee Notes to 902(4) make it clear that 902(3) applies to the originals of documents and that 902(4) is the section applicable to copies. Under this section the copy must be certified as correct by either the custodian or other authorized person, and this certification must itself conform to Rule 902(3) in order to be received.[44]

None of the documents involved here were obtained by plaintiffs from official custody or were accompanied by this type of official certification, and thus none are "self-authenticating" under Rule 902. Since the method of authentication provided in Rule 902 is not exclusive, however, plaintiffs' failure to procure certified copies does not bar authentication of the documents under Rule 901.

5. *"Best Evidence" Rule*

An issue closely related to authentication is set forth in Article X, often referred to as the "Best Evidence Rule." Rule 1002 states that the original of any writing is required, "except as otherwise provided in these rules . . ."

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[43] Advisory Committee Notes to Rule 901(b)(8).

[44] Advisory Committee Notes to Rule 902(4).

One such exception is stated in Rule 1003, which admits "duplicates"[45] to the same extent as the originals, provided there are no genuine questions as to authenticity and it would not be "unfair" to admit them in the circumstances. The documents involved are all duplicates and would satisfy these conditions. However, the protocols and testimony which plaintiffs offer may be viewed as public records, and there is authority which suggests that Rule 1005 supersedes Rule 1003 with respect to public documents.[46]

Rule 1005 deals specifically with Public Records, and provides two alternative methods of satisfying the "best evidence" requirements for copies of documents falling within its scope. The first is by providing a copy certified as correct in accordance with Rule 902, which as we noted *supra* has not been done with respect to any of the documents under consideration here. The second method is by presenting testimony of a witness who has compared the copy with the original. Only if neither of the foregoing can be obtained by "reasonable diligence" may other evidence of the contents be given. The plaintiffs have offered no testimony on the correctness of the copies offered, and have repeatedly asserted their intention to rest on their documentary evidence. Since "reasonable diligence" has not been exercised, the final clause of the rule is also inapplicable.

This section is one which, it turns out, was not invoked by the parties. Rather, we called it to the parties' attention as we were surveying the law after the conclusion of the evidentiary hearing, concerned that, in the welter of argument, it had in fact been invoked directly or indirectly. By letter, we inquired of the parties about its applicability. Plaintiffs replied in their letter to the Court of August 5, 1980, that:

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[45] "Duplicate" is defined in Rule 1001, and would include the photocopy reproductions involved here.

[46] Saltzburg states that it is "an obvious point" that Rule 1003 is preempted by Rule 1005. Saltzburg at 255 (1980 supp.). Weinstein also concludes that 1003 is preempted. 5 Weinstein 1005[01] at 1005-4 (1978). *Cf. Amoco Production Co. v. United States*, 619 F.2d 1383, 1389-91 (10th Cir. 1980), *rev'g* 455 F.Supp. 46 (D.Utah 1977).

> defendants have not objected to the admissibility of the protocols or transcripts of testimony, or any other public records (or any other document for that matter) on the grounds that they are not true and correct copies of original records lodged elsewhere.

A review of the record reveals that this contention is correct. Melco has argued that many of the documents were "copies that merely happened to be in the possession of the party" and in their July 12, 1980 brief, they listed among their objections to the testimony and protocols several points relating to the absence of certification or authenticating testimony, which are listed in our discussion of the testimony in Part VIII-B, *infra*. At no time have any defendants invoked Rule 1005, however, and none of the other defendants have made even passing reference to the issues involved under Article X. We therefore conclude that, despite the fact that defendants might have prevailed on the point, any potential issues under Rule 1005 have been waived. *See* Rule 103(a)(1). We will consider Melco's objection under the standards of Rule 901 which we have explained *supra*.

Melco has also urged that the testimony is inadmissible under Fed.R.Civ.P. 80(c), which provides:

> (c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Plaintiffs have provided no certification for the JFTC testimony they have proffered. There is little case law or commentary on this rule. Rules 80(a) and (b), which dealt with the appointment of stenographers to take evidence in U.S. federal courts, were abrogated by 1946 amendments to the Rules because of the Official Court Reporter Act of 1944, 28 U.S.C. § 753. *See* 7 Moore's Federal Practice Part 2 ¶ 80.01 at 80-2. Because of its original context, we believe that Rule 80(c) should be read to apply only to evidence which was stenographically reported in the United States federal courts.

See id. ¶ 80.02 at 80-7 (rule should now be read in conjunction with Official Court Reporter Act of 1944). Accordingly, the rule has no application to the testimony before us, which was recorded in Japan.

Having concluded our discussion of authentication and related matters, we turn to what are probably the most hotly contested evidentiary points, those relating to foundation requirements under 803(6), the business records exception to the hearsay rule.

B. *Qualification as a Business Record Under Rule 803(6)*

It is conceded that the numerous diaries, memoranda and letters considered during the pretrial evidentiary hearings are hearsay[47] and that to be admitted they must qualify under one of the exceptions to the hearsay rule.[48] The principal exception

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[47] Plaintiffs contend that the documents are not hearsay because they are admissions under Rule 801(d)(2). We consider this contention in its legal aspects in Part II C, *infra*. There are also some instances where the plaintiffs purport to offer documents for a non-hearsay purpose, *i.e.*, not to prove the truth of the matters contained herein. This proffer is made primarily with respect to certain of the diary entries, and the Japan Victor document. The plaintiffs contend that these notations are "verbal acts" which are evidence of the conspiracy merely by virtue of their having been made, regardless of the truth or falsity of the matters asserted therein. They also contend that certain notations in the diaries which might otherwise be "internal hearsay," *see* part II G, *infra*, are similarly offered not for the truth of the matter asserted therein, but simply for the fact of their having been made, thereby overcoming any internal hearsay objection. *See generally United States* v. *Zenni*, 492 F.Supp. 464 (E.D.Ky.1980). We discuss these matters *infra*.

[48] In addition to the hearsay exception of Rule 803(6), which we consider in this section, plaintiffs suggest that two other exceptions listed in Rule 803 are applicable to some or all of the documents: 803(1) and 803(5). These exceptions permit the admission into evidence of:

(1) *Present sense impression*.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(5) *Recorded recollection*.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been

made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

There are three principal requirements of Rule 803(1). The first requirement is that the declarant personally perceived the event described. *See* 4 Weinstein 803(1)[01] at 803-74 (1979). The second requirement is that the statement be an explanation or description of the event, rather than a narration. *See id.* at 803 76. The third and perhaps the most important requirement is contemporaneity of the statement and the event described. The reason for the exception for present sense impressions, as stated by the advisory committee, is "that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." In *United States* v. *Narcisco*, 446 F.Supp. 252, 285 288 (E.D.Mich.1977), a period of two hours between the event and the statement was found to be ample time for reflection, and the statement was excluded for lack of contemporaneity. In *Hilyer* v. *Howat Concrete Co., Inc.*, 578 F.2d 422 (D.C.Cir.1978), a period of fifteen to forty-five minutes between the event and the statement was too great to allow admission of the statement under 803(1). And in *Wolfson* v. *Mutual Life Insurance Co. of New York*, 455 F.Supp. 82 (M.D.Pa.), *aff'd mem.*, 588 F.2d 825 (3d Cir. 1978), the district court stated that statements made several hours after a meeting probably would not be sufficiently contemporaneous.

The requirements of Rule 803(5) are apparent from its language. First, the rule itself, as well as the Advisory Committee Note, the legislative history, and all commentators, speaks of "the witness," in contrast to the other hearsay exceptions, which speak of "the declarant." We think it plain that in the contemplation of its drafters and of Congress, Rule 803(5) applies only to the recorded recollection of a witness who is present and testifies, and not to the recorded recollection of an absent declarant. Moreover, the proponent of the statement must show that it was made or adopted at a time when the subject matter was fresh in the witness's memory, and that the witness now has insufficient recollection to enable him to testify fully and accurately. *United States* v. *Williams*, 571 F.2d 344 (6th Cir.), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978); *United States* v. *Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978). If these requirements are not met, the evidence must be excluded. *Id.*

Although the plaintiffs have invoked each of these sections in support of their claims of admissibility of certain documents, in no case have they laid the necessary foundation (that which we have just described), hence we shall not burden the record by further reference to these rules.

upon which the plaintiffs, as proponents of the evidence, rely is F.R.E. 803(6), the business records rule.[49] The Rule creates an exception from the hearsay rule for evidence which meets the following requirements:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

It is clear that business records need not be in a particular form to be admissible under Rule 803(6), which refers broadly to "a memorandum, report, record, or data compilation, in any form." There are cases which hold, for example, that personal diaries or appointment books which are kept regularly for a business purpose may be admissible under Rule 803(6). *E.g.*, *United States* v. *McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). We thus reject defendants' position that a personal diary, though kept for business purposes, is per se inadmissible. Other cognate documents which have been found admissible are notes made in the course of negotiations for a business opportunity, *Magnus Petroleum Co., Inc.* v. *Skelly Oil Co.*, 446 F.Supp. 874, 882-83 (E.D.Wis.1978), and a customer book kept by a member of a heroin importation consipiracy. *United States* v.

[49] The use of the term "business records" is imprecise. Rule 803(6) uses the phrase "records of regularly conducted activity." However, because "business record" is a widely used and convenient shorthand version, we shall utilize it throughout this opinion.

Baxter, 492 F.2d 150, 164 (9th Cir. 1973), *petition for cert. dismissed*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). Of course, a diary may fail to qualify as a business record. In *Hospital Television Inc.* v. *Wells Television, Inc.*, 462 F.2d 417 (8th Cir.), *cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972), Mr. Justice Clark, sitting specially, upheld the District Court's refusal to admit a diary of longhand notes into evidence under 28 U.S.C. § 1732(a) on the grounds that it was not a business record.

1. *The Impact of Rule 104(a); Will Inadmissible Evidence Suffice?*

In determining whether the diaries and memoranda qualify under 803(6), we must, at the threshold, confront the question whether such a determination depends upon admissible evidence. Defendants submit that it does; plaintiffs submit that it does not. Neither the Advisory Committee Notes nor any of the commentators have specifically addressed the question whether determination of 803(6) status comes under 104(a), in which case it could be made on the basis of inadmissible evidence, or whether it is subject to the provisions of 104(b), which on our reading requires admissible evidence. *See* p. 1219, *supra* (quoting Rule 104). Rule 104(b) applies by it terms only "[w]hen the *relevancy* of evidence depends on the fulfillment of a condition of fact" (emphasis added). The question is a close one, but with the qualification hereinafter stated, we conclude that hearsay exceptions do not raise questions of *relevancy* conditioned on fact.

The term "relevancy" as used in the Federal Rules of Evidence does not encompass all objections to the admissibility of evidence. Evidence may be quite relevant to the issues in a lawsuit, but still be barred as hearsay, or for other reasons. Conversely, evidence may be otherwise admissible, but barred as irrelevant. *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence 104(b)*, 47 Geo.Wash.L. Rev. 1048, 1059-1062 (1979). The Advisory Committee Note to Rule

104(a) gives several examples of evidentiary issues which are *not* matters of conditional relevancy-unavailablity of a hearsay declarant and the against-interest nature of a hearsay declaration. Thus it is clear that Rule 104(b) does not generally apply to determinations of the applicability of the hearsay exceptions.

The determination of business record status, in particular, is one which, before the Rules, was always for the court to make; indeed, we know of no instance where that matter has been submitted to the jury. We conclude that this determination is still for the Court to make in accordance with Rule 104(a), and that we are not bound by the Rules of Evidence in making the 803(6) determination. Therefore, we may rely upon evidence which is wholly inadmissible, or is admissible only against certain parties, in determining whether or not the proffered documents meet the requirements of Rule 803(6).

Since the determination of business record status will not be submitted to the jury at any point, there is no reason for us to treat our ruling on admissibility under 803(6) as a "prima facie" test. *Cf.* discussion at pp. 1218-1219, *supra*. Consequently, there is no reason to apply a lowered standard of proof to the determination. *Cf. id.* As a result, we will decide the questions relating to business record status on the basis of the preponderance of the evidence.[50]

As a corollary of this ruling, we hold that if the proffered documents qualify as business records, they will be admissible against all parties. The defendants have argued that a document which is qualified as a business record by evidence which is admissible only against one defendant would itself be admissible only against that defendant. Our ruling that 104(b) does not apply to 803(6) undercuts defendants' position, since the qualification of a document under 104(a) may be based on evidence which is not admissible against the party against whom the document is offered.

[50] *See* Saltzburg at 502 (court should "find" facts relevant to hearsay exceptions).

The defendants make forceful arguments against this position. They note, correctly, that they are entitled to attack the weight of any documents offered as business records before the jury by showing the lack of regularity of their preparation or other indicia of untrustworthiness. If admissibility as a business record is predicated upon inadmissible evidence, they submit that they should then be permitted to counter it with other inadmissible evidence. Coming full circle, they doubt the viability of the latter proposition, hence they question the validity of the former. Acknowledging the force of this position, we conclude that a strong argument can be made that the "custodian or other authorized witness" provision of 803(6) is tantamount to a requirement of qualification of a business record by admissible evidence.

While the question is not free from doubt, we nonetheless conclude that 104(a) applies in this area and that qualification as a business record may be based upon inadmissible evidence.

2. *The Requirement That The Records Be Kept In the Course of A Regularly Conducted Business Activity And That It Was The Regular Practice of That Business Activity to Make the Record.*

Rule 803(6) requires not only that a document must be "kept in the course of a regularly conducted business activity," but also that it must be "the regular practice of that business activity to make the memorandum, report, record, or data compilation" (we refer to this hereinafter as the "regular practice" requirement). It is the regular practice requirement which is mainly at issue. We address it at length because of the significant dispute between plaintiffs and defendants as to its meaning.

Defendants' approach to the language is literal, and rigorous. In defendants' submission, the rule says just what it means and means just what it says because of its underlying rationale. On their view "business records" can come in without the necessity of calling all the persons with personal knowledge of their construction precisely because their reliablity is

demonstrated by evidence of their making pursuant to established and routine company procedures for the systematic conduct of its business. Plaintiff, on the other hand, despite lip service to the text of the rule, downplay the "regular practice" terminology, virtually excising notions of "routineness" from the rule, and instead appear to substitute therefor a requirement of reliability. Plaintiffs' theory is that no more need be shown to require admission of a business-related document under 803(6) than that it is business-related and that its sources of information or other circumstances indicate reliability and trustworthiness. As will be seen, we conclude that the defendants' view of the Rule is the correct one.

The regular practice requirement originated in the Business Records Act, 28 U.S.C. § 1732(a), which governed the admissibility into evidence of business records in federal courts until the Federal Rules of Evidence took effect in 1975. Rule 803(6) as submitted to Congress did not include this requirement in its text, although a comparable requirement might well have been inferred from the Advisory Committee Note, which commented that "[t]he element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." The House Judiciary Committee restored the explicit regular practice requirement, and commented that "the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a *neccessary further assurance* of its trustworthiness."[51] (emphasis added). Thus it is plain that the regular practice requirement was taken by the House Judiciary Committee directly from existing law. Accordingly, we may appropriately consult pre—F.R.E. decisions interpreting the Business Records Act,

[51] H.Rep.No. 93-650, 93rd Cong., 1st. Sess. (1973) [hereinafter cited as "House Report"], U.S. Code Cong. & Admin.News 1974, p. 7051, 7087. The Senate Judiciary version of the rule in this respect. *See* S.Rep.No. 93-1277, 93rd Cong., 2d Sess. (1974) [hereinafter cited as "Senate Report"].

as well as post—F.R.E. decisions, to determine the content of the requirement.

Plaintiffs argue that "Congress, in enacting Rule 803(6), intended to liberalize the business records exception rather than to restrict prior practice."[52] Although the rule did liberalize the definition of what constitutes a "business," to the extent that they argue that there is a liberalization of *foundational* requirements over prior practice, we note our disagreement. We find nothing in the Advisory Committee Notes or congressional debates suggesting otherwise. The House Judiciary Committee's action and the requirements of 803(6) relating to personal knowledge, *see* Part II.B.5, *infra*, support our view.

In *Gordon* v. *Robinson*, 210 F.2d 192, 196 (3d Cir. 1954), the Court of Appeals commented:

> The legislative history of the Business Records Act clearly shows that it was not the intent of the draftsmen to make admissible all evidence, no matter how incompetent or irrelevant, merely by virtue of the fact it appeared in a record made in the regular course of business. Rather it was Congress' purpose to admit into evidence entries of a purely clerical or routine nature not dependent upon speculation, conjecture or opinion, where "accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations" without the necessity of calling the various entrants to identify the entries as their own, as was required under the common law shop book rule.

In *Standard Oil Company of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958), the Court of Appeals considered the admissibility of a number of memoranda, letters, and reports dealing with the pricing and marketing policies of oil companies other than the ones in whose files the writing was found. The Court of Appeals excluded the documents because of its finding

[52] Plaintiffs' Supplemental Memorandum in Support of the Admissibility of Evidence Relating to Certain Issues Raised during the Evidentiary Hearings, at p. 5 (hereinafter Post-Hearing Supplemental Memorandum).

that the plaintiff had failed to meet the burden of proving that the memoranda were made pursuant to any systematic or routine procedure. In so holding the Court discussed the regular practice requirement of § 1732:

> A memorandum or record cannot be considered as having been made in the "regular course" of business, within the meaning of § 1732, unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records . . . .
>
> Concerning almost all of the items comprising the grist of interoffice memoranda and letters which were introduced, the nonexistence of any such company procedure seems almost self-evident. They were patently intended as communications between employees, and not as records of company activity. Many of them were casual and informal in nature, seeking or providing information of a kind which could be, and no doubt often was, communicated by telphone or in conference. Most of them were apparently written as a result of the exercise of individual judgment and discretion.
>
> If there was any systematic or routine procedure being followed in the preparation and filing of such writings, the burden was upon appellee to prove it. He failed to do so, at least with regard to most such exhibits. Where this foundation was lacking, the exhibit was not admissible under § 1732.

Id. at 215 (footnotes omitted).[53]

The more recent decisions interpreting the regular practice requirement in Rule 803(6) have adhered to the standards articulated in *Gordon* and *Standard Oil*. *E.g.*, *United States* v. *Kim*, 595 F.2d 755, 761 (D.C.Cir.1979); *United States* v. *McPartlin*, *supra*, 595 F.2d at 1347-50; *Coughlin* v. *Capitol Cement Company*, 571 F.2d 290, 307 (5th Cir. 1978). We endorse these standards too. Plaintiffs rely heavily upon

[53] While the Advisory Committee's Note takes issue with *Moore* on one point, it is a different one, relating to whether the reporting employee must be a participant in the matters reported.

McPartlin, an action involving conspiracy to violate the wire and travel statutes arising from Ingram Corporation's bribery of city officials in connection with a sludge-hauling contract. The Court of Appeals for the Seventh Circuit upheld the trial court's determination that desk-calendar appointment diaries of William Benton, and unindicted co-conspirator, and a witness for the government, who was also a vice-president of Ingram Corporation, were admissible business records pursuant to Fed.R.Evid. 803(6). However, the *McPartlin* decision did not depart from the rule that the proponent of a business record show that it was a regular practice to make the entries in question. As a foundation for admission, Benton testified at trial that he kept the diaries and made entries in them as a regular part of his business activity as a vice-president of Ingram. Moreover, he testified that he relied upon them, thereby establishing the important element of reliability. Also worthy of note is the fact that the diaries were used at trial not independently, but for corroboration of details.

Plaintiffs, in their Post-Hearing Supplemental Memorandum, argue that the courts have permitted documents to qualify as business records without regard to whether the particular type of record was routinely made. In support of this proposition they cite several cases, mostly pre-F.R.E., none of which support their position. In *United States* v. *Hyde*, 448 F.2d 815, 846 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), the Court admitted handwritten notes on the details of a certain settlement made at a meeting at which the notewriter, Branum, was present. However Branum *testified* at trial that he *regularly* kept informal notes of transactions on note cards in such situations which he turned over to another officer of his company for safekeeping. In *United States* v. *Moran*, 151 F.2d 661 (2d Cir. 1945), the Court admitted a memorandum of a telephone conversation made by a bank employee. However, the court found that the memorandum was a "routine record made for the bank's business as such," *id.* at 662, thereby satisfying the regular practice requirement. *Magnus Petroleum Co.* v. *Skelly Oil Co.*,

supra, involved notes made in the course of negotiations for a business opportunity. However, based on the *testimony* of the scrivener, who was subject to cross-examination, the Court found them to be a part of a regularly conducted business activity.

Thus, we hold that for the diaries and memoranda to be admissible under 803(6), the plaintiffs must show[54] that their entries were made pursuant to a systematic and routine procedure for the conduct of business, one characterized by careful checking and habits of precision and regularity such as will justify confidence in the reliability of the record keeping. At the least there must be detailed showing of the nature of the business practice creating the document, the method of record-keeping, the source of the information, and the author's reliance on it. We will review the evidence of regular practice as we proceed through the documents one-by-one in our subsequent discussion. We turn now to cognate question, the method of establishing that regularity of practice.

3. *The Requirement of Qualification by a Custodian or Other Qualified Witness*

F.R.E. 803(6) provides that its requisites be shown "by the testimony of the custodian or other qualified witness." This provision not only places the burden of laying a proper foundation upon the proponent of the document, but appears to require that the foundation be laid in a specific way. The plaintiffs have not sought to establish that the diaries are business records by such testimony. Rather the plaintiffs have relied upon a variety of other means and contentions: (1) evidence from the protocols and to a lesser extent from the JFTC testimony; (2) the fact that the diaries, memoranda, and other materials were produced by defendants pursuant to certain answers to interrogatories in which they invoked F.R.Civ.P. 33(c); (3) alleged estoppel to deny business records status because of the text and terms of certain answers to interroga-

[54] *See* p.____, *infra* (burden of proof).

tories; (4) cross references to other diaries, documents, and answers to interrogatories in the case; and (5) evidence from the diaries and other documents themselves, *i.e.*, the fact they they refer to important business matters; relate information supposedly relied upon by the employers of the diarists; and are said to look like business records (we have dubbed this the "res ipsa loquitur" theory of business records).

Because of plaintiffs' failure to comply with literal terms of F.R.E. 803(6) the defendants maintain that the diaries and memoranda do not qualify as business records. As evidence of the rigor of the requirement, the defendants point to the fact that Business Record Act, 28 U.S.C. § 1732, which, as we have noted, governed the admission of business records into evidence in federal courts from 1936 until the F.R.E. became operative in 1975, contained no such requirement. They contend that this change in the law was carefully considered, and reflects a desire to be more rigorous in connection with the qualification of documents as business records, by requiring testimony of some qualified witness. *Cf.* p.____, *supra*. The defendants cite a number of cases which, on their reading, hold that such testimony is required. *E.g., Coughlin* v. *Capitol Cement Company*, 571 F.2d 290 (5th Cir. 1978); *United States* v. *Jones*, 554 F.2d 251 (5th Cir.), *cert. denied*, 434 U.S. 866, 98 S.Ct. 202, 54 L.Ed.2d 142 (1977); *United States* v. *Carranco*, 551 F.2d 1197 (10th Cir. 1977). Defendants also cite a number of pre-F.R.E. cases to similar effect. *See, e.g., United States* v. *Rosenstein*, 474 F.2d 705 (2nd Cir. 1973); *Hagans* v. *Ellerman and Bucknall Steamship Company*, 318 F.2d 563, 574-77 (3d Cir. 1963).

Coughlin, for instance, appears to be quite specific on the point:

> There can be no doubt but that the party who seeks to introduce written evidence must in some way authenticate it. We agree that under the exception, "[t]he testimony of the custodian or other qualified witness who can explain the record-keeping of the organization is essential. If the witness cannot vouch that the requirements of Rule 803(6) have been met, the entry must be excluded."

571 F.2d at 307 (citation omitted). There are similar statements in *Hagans* v. *Ellerman* ("no foundation was offered to qualify the document as a record kept in the ordinary course of business . . . or that such surveys were systematically ordered for it"). *See also Lewis* v. *Baker*, 526 F.2d 470, 474 (2d Cir. 1975) ("All that is required is that someone who is sufficiently familiar with business practices be able to testify that the record was made regularly as part of those business practices and that the record is a truly authentic one"); *United States* v. *Blake*, 488 F.2d 101, 105 (5th Cir. 1973) ("testimony must be given by a custodian"); *National Reserch Development Co.* v. *Great Lakes Carbon Corp.*, 410 F.Supp. 1108, 1113 n. 20 (D.Del.1975) (M. Schwartz, J) ("basic elements of the Federal Rules of Evidence 803(6) exception . . . are lacking in that there has been no showing by a 'custodian or other qualified witness' that the notes were either made or kept in the regular practice of investors' professional activity"). Plaintiffs, on the other hand, counter with the argument that the literal approach to 803(6) has been discarded by courts under appropriate circumstances. Plaintiffs cite a number of cases where records were qualified by courts under 803(6) in the absence of a custodian. *E.g., United States* v. *Hines*, 564 F.2d 925 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 748, 54 L.Ed.2d 770 (1978) (vehicle bill of sale); *United States* v. *Holladay*, 566 F.2d 1018 (5th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978) (seized gas station notebooks demonstrating themselves to be part of single entry bookkeeping system continually maintained since 1967 for purpose of accounting for receipts and disbursements held admissible under 803(6)). *Accord*, 4 Weinstein ¶ 803(6)[02] at 803-152. Plaintiffs also cite pre-F.R.E. decisions in support for their position. *United States* v. *Leal*, 509 F.2d 122 (9th Cir. 1975) (hotel registration forms required by Hong Kong law supported by affidavit of assistant manager); *United States* v. *Ragano*, 520 F.2d 1191 (5th Cir. 1975) (corporate reports required by state law admitted without testimony). Plaintiffs submit that this result is supported by the modern and flexible approach of the Federal Rules which favor the submission

rather the the exclusion of probative evidence, citing F.R.E. 102.

Close examination of the cases cited by both parties reveals that none of them have come squarely to grips with the question with which we are faced: may the proponent of materials sought to be qualified under F.R.E. 803(6) meet his burden without introducing testimony of the "custodian or other qualified witness." In the cited cases upholding exclusion there was plainly an inadequate basis to meet 803(6), whether or not live testimony was supplied.[55] In the cases admitting the documents, the court had no difficulty in finding the test met, but did not expressly resolve the question whether the evidence which qualified the document must be disregarded because of the absence of the witness. *See also E. C. Ernst, Inc.* v. *Koppers Co.*, 626 F.2d 324 at 330 (3d Cir. 1980) (rule satisfied by testimony of the custodian). Indeed, defendants correctly distinguish the cases relied upon by plaintiffs in this area (some

[55] For instance, in *Coughlin*, the Court noted:

> Only two witnesses testified with respect to the agenda. J. Dan Bohannan, one of plaintiff's attorneys, testified that he found it in the Association's files during discovery and acknowledged that it did not bear a signature. Bohannan knew nothing else about the source or authenticity of the document. Doug Riff, who was president of Olmos Rock Products Corp. and an officer of the Association in 1969, identified the agenda and stated: "I don't know who prepared it. I suppose Al Brown." Brown, the executive director of the Association, was not available to testify.

571 F.2d at 307. It is plain that the document was not qualified as a business record, notwithstanding the testimony of these two witnesses. In *Rosenstein*, defendants were convicted of conspiracy to evade and evasion of income taxes, having accomplished this by creating a dummy corporation, CTE, in Liechtenstein. Their American clients were asked to make their commission payments payable to CTE and were instructed to send the checks to an attorney, Batliner, in Liechtenstein. At trial, the government offered a CTE file into evidence through the testimony of an associate of Batliner. The Court held that the file was inadmissible under the business records exception because the witness "not only did not keep the records, he did not even know from his personal knowledge that the records were kept in Batliner's office. He did not testify to the business practice of CTE or that it was the practice of CTE to keep the documents which were introduced." 474 F.2d at 710.

but not all of which are cited in the text) on one of three grounds: (1) there was some form of testimony—or stipulation—establishing foundation; (2) unlike diaries or memoranda of meetings, the records involved in those cases were on their face routine and regular clerical or financial documents such as hotel receipts, purchase orders, financial statements, stock transfer records, or filings with government agencies; and (3) the courts did not discuss the precise issue before us.

In order to resolve this question of law, we look first to the Advisory Committee Note to Rule 803(6). After listing a number of business records statutes drafted or enacted in the 1920's and 1930's, including the federal Business Records Act, 28 U.S.C. § 1732, which was based on the so-called Commonwealth Fund Act, the committee continued:

> These reform efforts . . . concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.
>
> On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. [citations omitted]. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, *abolished the common law requirement in express terms*, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

(Emphasis added). There is no indication in the Advisory Committee Note that the Committee intended, by following the language of the Uniform Business Records as Evidence Act, to

change federal law by requiring live testimony where none had been required before. To the contrary, the committee strongly endorsed the liberalization of common-law requirements as to the production of witnesses to qualify documents as business records. Moreover, the committee's adoption of the language of the Uniform Act appears to reflect a determination that the "burdensome and crippling" common-law rules should be abolished "in express terms," instead of implicitly as in the Business Records Act.

Because we believe that the Federal Rules of Evidence favor a flexible approach, see Rule 102, and in the absence of a clear indication to the contrary in the Advisory Committee Note, we opt for the view that the testimony of the custodian or other qualified witness is not a sine qua non of admissibility in the occasional case where the requirements for qualification as a business record can be met by documentary evidence, affidavits, or admissions of the parties, *i.e.*, by circumstantial evidence, or by a combination of direct and circumstantial evidence.

It is clear from the express language of F.R.E. 803(6) that before a document can be admitted into evidence a proper foundation for its admission must be laid and that the burden of laying such a foundation is on the party seeking to introduce the document. *Accord, United States* v. *McPartlin, supra; Standard Oil Co. of California* v. *Moore, supra; Hagens* v. *Ellerman & Bucknall Steamship Company, supra; Coughlin* v. *Capitol Cement Co., supra.* We hold that to meet this burden in the absence of a "custodian or other qualified witness," plaintiffs must show regularity of practice in some precise and explicit manner, either by external evidence or from the documents themselves plus surrounding circumstances. To require less would strip the regularity of practice requirement of vitality, at least in a case such as this where what are proffered are not routine clerical or financial documents such as hotel registration forms or vehicle bills of sale or bank statements, but rather diaries and memoranda heavily laden with cryptic and half-expressed statements which cannot, we

find, be interpreted without the testimony of the author explaining what he meant by each entry. We will consider plaintiffs' proffer, notwithstanding the lack of "custodian or other qualified witness," but against this rigorous standard.

4. *The Import of Rule 33(c) Production.*

Plaintiffs contend that by producing the diaries and memoranda pursuant to F.R.Civ.P. 33(c) the defendants have conceded that they are business records. They rely in this respect upon the language of Rule 33(c), of the Civil Rules which is entitled "Option to Produce Business Records."[56] They also rely upon the wording of their interrogatories 8 and 42-44 to each of the producing defendants and their responses thereto.

The first problem with this argument is that the answers to the interrogatories make clear that the defendants are not conceding that the materials produced are business records within the meaning of 803(6). Secondly, we think that the bar and the courts would be startled if they were retrospectively to find that a production under Rule 33(c) constituted an admission that everything that was produced qualfied as a record of regularly conducted activity within the meaning of F.R.E. 803(6). There is nothing in the language of Rule 33(c) which suggests that the very specific requirements of 803(6) are waived by its invocation. That invocation is considered a convenience to the bar and a means to facilitate the discovery process. The problems of federal discovery are great enough without rendering Rule 33(c) into a trap for the unwary.[57]

5. *The Personal Knowledge and Trustworthiness Requirements*

Rule 803(6) requires as a condition of admissibility that business records be "made at or near the time by, or from

[56] While not the basis for our conclusion, we note that 803(6) refers to "records of regularly conducted activity," not "business records," the terms used in Rule 33(c). *See* n.49 *supra*.

[57] We have cited no cases in this segment of our opinion because we can find none that are apposite.

information transmitted by, a person with knowledge." This provision represents a change from the Business Records Act, which provided that "lack of personal knowledge by the entrant or maker" could be shown to affect weight but not admissibility. 28 U.S.C. § 1732(a) (repealed 1975).

This provision of the rule was intended to deal with the problem of business records which merely record information transmitted by an informant. The Advisory Committee Note comments:

> An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision . . . The rule . . . requir[es] an informant with knowledge acting in the course of the regularly conducted activity.

The Senate Judiciary Committee stated its view that the personal knowledge requirement not be interpreted to require the identification of the particular person upon whose knowledge the record was based, so long as the proponent of the evidence could show that it was the regular practice of the activity to base its records upon information transmitted by a person with knowledge:

> It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, *e.g.*, in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of

> a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system.

Senate Report, U.S. Code Cong. & Admin. News 1974, p. 7063. Thus, in order to meet the personal knowledge requirement of the rule, plaintiffs must show either (1) that the author of the document had personal knowledge of the matters reported, or (2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity, or (3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge. In the absence of a showing of personal knowledge, made in one or more of these three ways, a document cannot qualify as a business record.

A related provision of Rule 803(6) denies admissibility even to evidence which meets every other requirement of the rule, if "the source of the information or the method or circumstances of preparation indicate lack of trustworthiness." The burden of showing the untrustworthy nature of evidence which is otherwise admissible under 803(6) is on the opponent of the evidence. In assessing the trustworthiness of the documents before us, we would look, *inter alia*, to factors analogous to those enumerated in our Public Records Opinion at 26-27. Thus, we might find that a document which is obviously riddled with hearsay statements which were not transmitted by a person with knowledge is so untrustworthy as to fail to qualify under the 803(6) exception. *See* Part II-G, *infra* (discussion of Rule 805).

We also think that a document which is unintelligible is for that reason untrustworthy if offered to prove the truth of *one* interpretation out of many possible interpretations which could be put on the document. The requirement of trustworthiness is intended to prevent the trier of fact from deciding cases on the basis of mere speculation rather than probative evidence. When a document which is unintelligible on its face is presented to the trier of fact, it is not probative evidence, but merely an invitation to engage in unfounded speculation. In

such a situation, the document itself reveals its own "method or circumstances of preparation" sufficiently to make it untrustworthy under the 803(6) proviso.

Having completed our analysis of Rule 803(6), we turn to the issues presented by plaintiffs' proffer of the documents as admissions under Rule 801(d)(2)(B), (C) and (D).

C. *Qualification as Admissions by Party-Opponent under Rules 801(d)(2)(B), (C) and (D).*

In addition to asserting admissibility under 803(6), *supra*, upon which plaintiffs place primary reliance, they offer many of the documents being considered here as Admissions by Party-Opponent under Rules 801(d)(2)(B), (C) and (D):

> (d) Statements which are not hearsay. A statement is not hearsay if . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . .

Unlike statements admitted under Rule 803(6), which would be admissible against all parties, statements admitted under 801(d)(2)(B), (C) and (D) are admissible only against parties who have adopted the statement, or who bear the specified relationship to the declarant.

As a preliminary matter we must decide whether we are to determine admissibility under 801(d)(2) according to the provisions of 104(a) alone, *i.e.*, whether inadmissible evidence may be considered, or whether 104(b) also applies, limiting our decision to admissible evidence. *See generally* pp. 1219-1220, *supra*. While Rule 801(d)(2) is not a hearsay *exception* (see discussion *infra)*, the same types of "competency" issues must be evaluated in establishing "authority," "agency," or "scope of employment" as are considered in ruling on hearsay excep-

tions. These issues are *not* ones of conditional relevancy within the meaning of Rule 104(b), for the reasons stated in our discussion of the interface between Rules 104 and 803(6), at pp. 1229-1230, *supra*. In accordance with our reasoning stated there, we shall determine preliminary issues of fact under Rule 801(d)(2) on the basis of both admissible and inadmissible evidence, and shall apply a preponderance of the evidence standard of proof.[58]

1. *"Non-Hearsay"—the Treatment of Admissions in the F.R.E.*

Subdivision (d) of Rule 801 is a marked departure from the common law in that all of the statements it defines as "not hearsay" were considered hearsay under preexisting law. Saltzburg at 457. The subsection we are dealing with, (d)(2) Admission by Party Opponent, was an "exception" under the tradi-

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[58] The decision of the court on these preliminary issues does not of course preclude the parties from raising the same issues with regard to the substantive portion of the case. For example, "scope of employment" issues may arise in conjunction with the attendance of defendants' employees at meetings of various trade associations. The preliminary determinations by the court should not affect these deliberations and the trier of fact is not bound by any such decision of the court. Only admissible evidence, of course, may be considered by the trier of fact on these ultimate issues. *See* 1 Weinstein ¶ 104[01] at 104-16, ¶ 104[02] at 104 23.

In some instances issues of "competency" may coincide with issues of relevancy. For example, under Rule 801(d)(2)(B), the statement of a nonparty is admissible as an admission if a party adopts the statement. The determination of whether or not the statement was adopted by the party would not ordinarily be an issue of relevancy. However, the relavancy of a statement made in a party's presence may also depend on the party's response to the statement. For example, an otherwise irrelevant accusation of a third party may become relevant only if the party accused expressly or tacitly assented to it. Thus the factual predicate of the "relevancy" determination may coincide with that of "adoption." In such cases *both* relevancy and hearsay issues must be resolved in favor of admissibility for evidence to be received relevancy on a standard of substantial admissible evidence, *see* pp. 1219-1220, *supra*, and hearsay on a standard of preponderance of all evidence, including inadmissible evidence.

tional hearsay rule.[59] The rationale for admitting this type of statement has been the subject of lengthy academic dispute.[60]

The Advisory Committee Notes explain the treatment of admissions in the Federal Rules as follows:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Congress enacted the proposed Rule 801(d)(2) without change.[61]

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[59] Saltzburg at 457; McCormick § 262 at 629 (1972); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore, Evidence § 1048, 4.

[60] Morgan and Wigmore propose that a party cannot object that his own statement was not under oath, or that he lacked opportunity to cross examine himself. Morgan, 266; Wigmore § 1048, 4. Strahorn asserts that admissions are "relevant conduct of the speaker," Strahorn, The Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484 at 576 (1937), and Lev claims they are admitted under the doctrine of "estoppel." Lev, The Law of Vicarious Admissions—An Estoppel, 26 U.Cinn.L.Rev. 17, 29, 30 (1957). Saltzburg and McCormick, however, feel that the most satisfactory explanation is that they are admitted as "the product of the adversary system." McCormick also notes the similarity to stipulations or admissions in pleadings. McCormick § 262, 629.

[61] Congressional action on another proposed rule suggests, however, that the distinction which the Rules make by defining admissions as non hearsay instead of as hearsay exceptions should be given little weight. Rule 806 as submitted to Congress provided that the credibility of a hearsay declarant might be attacked or supported as if the declarant had testified as a witness. The Senate Judiciary Committee amended the rule to apply to "a hearsay

The most important change from the common law made by Rule 801(d)(2), apart from denominating admissions as non-hearsay rather than a hearsay exception, was the addition of subsection (D), making admissible against a party "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Statements in this category, commonly known as "vicarious admissions," were not admissible under the traditional common law rule, which required "speaking authority" as codified in subsection (C). *See infra*. The Advisory Committee explained this change as follows:

> The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); *Martin* v. *Savage Truck Lines, Inc.*, 121 F.Supp. 417 (D.D.C. 1954).

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statement, *or a statement defined in rule 801(d)(2)(C), (D), or (E)*." (Emphasis added.). The Committee explained:

> While statements by a person authorized by a party opponent to make a statement concerning the subject, by the party opponent's agent or by a coconspirator of a party see Rule 801(d)(2)(C), (D) and (E) are traditionally defined as exceptions to the hearsay rule, Rule 801 defines such admission by a party opponent as statements which are not hearsay. . . . The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of Rule 806 is likely attributable to the *drafting technique used to codify the hearsay rule*, viz. some statements, instead of being referred to a exceptions to the hearsay rule, are defined as statements which are not hearsay.

(Emphasis added.) The House concurred in the amendment and the Senate proposal is now an integral part of the Rules, the consequence of which, we believe, should be widely noted.

The broad rule requiring receipt into evidence of the statements of a party's employee seems to rest on a slightly different foundation from the rule favoring receipt of a party's *own* statements. As Judge Weinstein has observed, "[v]icarious admissions do not lend themselves readily to any of the analyses proposed" to explain the receipt of admissions generally. He feels that vicarious admissions are received under the Rules because of the "practical need for pertinent evidence" and represent a judgment by the draftsmen that such statements would "on balance, be more helpful than harmful in determining truth." 4 Weinstein ¶ 801(d)(2)[01] at 801-137 & 138. This view is supported by the Advisory Committee Note, which explains the inclusion of vicarious admissions as the result of "[d]issatisfaction with [the] loss of *valuable and helpful evidence*." (emphasis added).[62]

2. *An Admission Must be an Assertion*

Under Rule 801(d)(2), an admission is defined as a "statement" which possesses certain attributes. The term "statement" is defined in Rule 801(a) to include oral and written assertions as well as nonverbal conduct, if intended as an assertion. Since all of the hearsay evidence before us is in written form, for our present purposes the term "statement" is equivalent to the term "written assertion."

The fact that admissions are defined as types of "statements" probably would not be of much import in the ordinary case. The term assumes prominence in this case, however, because the diaries of a number of Japanese executives offered by the plaintiffs are compilations of written notations. Some of the diary entries are comprehensible to the reader, but most are not, and are, in any event, recordation not of utterances or "statements" of the diarist, but "statements" or thoughts of a third party. Plaintiffs also offer a number of memoranda which are equally unclear. We are thus presented with two questions: (1) can a document which is, at best, a compilation of "statements" be admissible as a whole under 801(d)(2), without separate analysis of each statement therein; and (2) can a written notation which does not clearly assert the truth of some proposition be admissible under 801(d)(2)? We answer both questions in the negative.

[62] Quoted at p. 1240, *supra*.

First, as to whether or not a compilation can be admissible as a whole without separate analysis of each statement within it, we think that Rule 801(d)(2) requires that each statement be separately admissible. Unlike Rule 803(6), for example, which expressly authorizes the admission of a "data compilation" as a whole, Rule 801(d)(2) speaks in terms of individual "statements." Obviously, in some situations a compilation might be admissible because each of the statements within it is separately admissible. *E.g.*, *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (defendant's appointment calendar admitted under 801(d)(2)(A)). The diaries before us are not of this character, however. Quite apart from the problem of entries which are incomprehensible, the diaries include at least two types of statements which may fail to qualify as admissions. First, there are entries which have been shown to be outside the scope of the diarist's employment by evidence extrinsic to the diaries themselves. For instance, some of the Japanese executives testified before the JFTC that their responsibilities related solely to the domestic Japanese market, but their diaries included scattered references to matters interpreted by plaintiffs as relating to exports. Secondly, there are a great many internal hearsay statements within the diaries. *See infra*. Under these circumstances, we cannot determine the admissibility of the diaries without a separate analysis of the individual statements in them.

Of equal importance is the question whether a written notation which cannot reasonably be characterized as an assertion can be admissible under 801(d)(2). The diary entries and memoranda which the plaintiffs seek to qualify under that rule differ greatly in their form from the usual type of statements which the courts have allowed into evidence as admissions. It is

instructive, for example, to examine the three cases cited favorably by the Advisory Committee in its notes explaining the admissibility of vicarious admissions under 801(d)(2)(D). In *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958), the court of appeals upheld the admissibility of hearsay statements made by a truck driver concerning the collision which had given rise to the action:

> The judgment is challenged on the further ground that the court erred in allowing admissions of appellant Grayson [the driver] to be admitted in evidence against Southern Freightways, Inc. Three persons visited Grayson in the hospital several hours after the accident. They asked him if appellee's truck was in its proper lane. Lockhead testified in substance that Grayson replied that it was and stated further that he didn't see the Union Pacific truck until the last minute and couldn't avoid striking it. Minardi testified that he said both trucks were in their proper lane and "I just didn't see the truck in time enough to avoid striking it." Sgt. Schwarting testified that Grayson said he didn't see the other truck until it was right on him; that he cramped his wheels to the left but was too late and they hit.

Id. at 66. In *Martin* v. *Savage Truck Line, Inc.*, 121 F.Supp. 417 (D.D.C. 1954), the court admitted "a statement made by the driver of the truck to an investigating police officer at the scene of the collision . . . to the effect that he was driving at the rate of thirty miles an hour, but that the green light was with him," *Id.* at 418. In *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961), the court of appeals upheld the admissibility of a statement made by an aircraft radio operator to an investigator concerning the operator's own conduct during the airplane crash which was the subject of the lawsuit. In each of these cases, which the Advisory Committee cited as archetypal admissions, it was clear that the declarant was asserting certain facts, and it was equally clear what the facts were which he was asserting.

The statements which have come into evidence as admissions since the enactment of the Federal Rules of Evidence are for the most part equally clear. To take only one graphic example, in *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978), the plaintiffs claimed that their 3-year-old child had been bitten by a wolf named Sophie, who was kept by a naturalist in his back yard. The court of appeals reversed the trial court's exclusion of hearsay statements, including the wolf's custodian's written assertion that "Sophie bit a child that came in our back yard." *Id.* at 629. A clearer assertion of fact could hardly be imagined.

There are two reported decisions in which diary entries which may have been similar to those offered here have been allowed into evidence as admissions. *United States* v. *McPartlin*, 595 F.2d 1321, 1347-51 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979); *United States* v. *Evans*, *supra*. The opinions in those cases do not provide sufficient information about the contents of the diaries offered there for us to determine whether they were as inscrutable as those offered here. In any event, both cases are plainly distinguished from the situation now before us by one crucial circumstance: in both cases the diarist himself was present at the trial and could clarify the meaning of any unclear diary entries. In *McPartlin*, the diarist testified at length as "the principal government witness." 595 F.2d at 1345. In *Evans*, the diarist was one of the defendants and could have challenged the government's interpretation of any entries which were unclear by testifying or by his counsel's objections. We are aware of *no* decisions holding that written notations which are not clearly assertions can come into evidence in the absence of testimony to explain their meaning.

The plaintiffs argue that a diary entry which is not an assertion is *ipso facto* not hearsay, since "hearsay" is defined in Rule 801(c) as "a statement . . . offered in evidence to prove the truth of the matter asserted." Although this argument has a superficial plausibility, it is fatally flawed as it applies to the documents involved here. Apart from a few entries which

plaintiffs purport to offer for a non-hearsay purpose, *i.e.* not to prove the truth of the matter asserted,[63] the plaintiffs' theory of the relevance of the diary entries is that the entries are susceptible to a certain interpretation which supports the plaintiffs' case. In other words, whatever the plaintiffs from time to time say, the fact is that plaintiffs' offer of the diary entries is for the truth of the matter which they claim to be asserted therein. Thus if the entries are not assertions, they are not probative evidence of any fact which is material to the determination of the action. Therefore any entries which are not assertions will be excluded as irrelevant under Rules 401 and 402, except insofar as they can be demonstrated to have been truly offered for a non-hearsay purpose.

We think that plaintiffs, as proponents of the diary entries, bear the burden of establishing that they are assertions and of ascertaining, with reasonable clarity, what the facts are which are asserted therein. The mere claim, in the form of counsel's argument, that entries which are on their face unclear and inscrutable are susceptible of a certain interpretation which supports plaintiffs' case, and that a jury should be permitted to decide what they mean, is not a sufficient foundation. Instead, the plaintiffs should have established the meaning of unclear diary entries through foundational evidence, in the form of testimony or otherwise. In the absence of such a foundation, the entries cannot qualify as admissions under Rule 801(d)(2).

The defendants have argued that an admission must be "clear and concise," citing *Pulver* v. *Union Inv. Co.*, 279 F. 699, 705 (8th Cir. 1922); *Evis Manufacturing Co.* v. *FTC*, 287 F.2d 831, 839-40 (9th Cir.), *cert. denied*, 368 U.S. 824, 82 S.Ct. 43, 7 L.Ed.2d 28 (1961). Although we find their authorities inapposite, we are in substantial agreement with their teaching that an unclear notation cannot be an admission, at least in the absence of foundation evidence, for the reasons stated. The defendants also argue that an admission must be communi-

[63] We will address that proffer *infra* in ruling on specific documents.

cated to someone. This is apparently an extension of their argument that an agent's statement cannot be an admission unless it was communicated to someone other than the agent's principal. While the latter contention has ample support in pre-F.R.E. law, we have determined that the decisions upon which defendants rely were overruled by the enactment of the Rules. *See* pp. 1246-1247, *infra*. We recognize the force of defendants' argument that a statement or notation which is never communicated by the declarant to *anyone* is less likely to be trustworthy than a statement which *is* so communicated. However, we see no reason to read into Rule 801(d)(2) a requirement which would preclude all uncommunicated statements, including, for example, all entries made in a private diary, from ever coming into evidence as admissions.[64]

In accordance with the overall plan of this opinion, we defer our consideration of specific diaries and entries until after our discussion of all the legal issues raised by the parties.

3. *Adoptive Admissions*

Although the particular legal issues which now confront us under 801(d)(2)(B) were never sharply drawn in argument or briefs, a major difference in the positions of the parties sur-

[64] The defendants also argue that a vicarious admission under Rule 801(d)(2)(C) & (D) must be based upon the agent's personal knowledge. We find this issue very troubling, particularly since Judge Weinstein argues persuasively in support of such a personal knowledge requirement. 4 Weinstein ¶ 801(d)(2)(C)[01] at 801-156-58 and ¶ 801(D)(2)(D)[01] at 801-164. Judge Weinstein criticizes *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978), in which the Eighth Circuit refused to infer such a requirement. 4 Weinstein at 801-164-65. In view of our rulings that an admission must be an assertion, that an admission does not include internal hearsay statements unless adopted by the declarant, *see* pp. 1266-1267, *infra*, and that an admission under 801(d)(2)(D) must meet the clear requirement of the rule that it concern matters within the scope of the agent's employment, *see*, pp. 1245-1246, *infra*, we do not reach the question of a personal knowledge requirement for authorized or vicarious admissions. Any diary entries to which an objection might be interposed on the basis of an inadequate showing of the declarant's personal knowledge are here also subject to objection on the other grounds mentioned.

faced in the outlining of those factual patterns which, in plaintiffs' submission satisfied the criteria for adoption but which defendants claimed were insufficient. This disagreement involves the circumstances in which a party's reference to a document in a protocol, testimony, or interrogatory, constitutes an adoption of all or part of the writing referred to.

Rule 801(d)(2)(B) provides for the admissibility of a statement of which a party has "manifested his adoption or belief in its truth." We agree with Judge Weinstein that the language of the rule requires evidence that the party's conduct was "intended" as an adoption. Weinstein § 801(d)(2)(B)[01] at 801-144.[65]

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[65] It seems clear that many such references are to writings which the "adopting" declarant has not read, either in whole or in part. The Advisory Committee Note to 801(d)(2)(B) state that while knowledge of contents is not "inevitably" essential, it is ordinarily so. The example given, where a party states that "X is a reliable person and knows what he is talking about," suggests that the adoptive declaration must quite explicitly manifest the party's adoption or belief in statements beyond those which he has heard or read. In cases of this type of "advance" adoption, McCormick suggests that the statements may be classified as "representative or vicarious admissions, rather than adoptive." McCormick § 246, at 525. We believe that it is the scope of the adoptive statement which renders knowledge of contents unimportant rather than its timing, and where such "carte blanche" approval is expressed, it is unimportant whether it is given in "advance" of the statements adopted or after they have been made, or whether the other criteria of representative admissions have been satisfied.

The only case which we have found that is close to the situation we have here, where long, complex writings are involved and where the adopting party has not been shown to have knowledge of the contents of the material "adopted," is *United States* v. *Article of Drug*, 362 F.2d 923 (3d Cir. 1966). The evidence there consisted of transcripts of a series of radio broadcasts, admitted to establish the intended use of vitamin and mineral products offered for sale by the defendant manufacturer. While the Court found that the defendant had "adopted as its own representations" the declarant lecturer's broadcasts, it is clear from the factual circumstances that the statements were not only adopted but also "authorized" and "within the scope of" the lecturer's "agency or employment." The declarant radio lecturer's picture appeared in defendant's catalogue along with the facts that he was defendant's "Chief Consultant" and had "scientifically formulated the exclusive formulas" in the catalogue. He received a weekly salary from defendant

In *United States* v. *Coppola*, 526 F.2d 764 (10th Cir. 1975), for example, the Court of Appeals distinguished the improper admission of evidence in defendant's first trial from the proper admission of the same statements in defendant's second trial:

> It is not enough that Herman recounted Molina's statements in Coppola's presence and Coppola was silent or did not otherwise respond. Testimony that an accused adopted statements of another person may be let in as an adoptive admission only if it appears the accused understood and unambiguously assented to those statements.

Id. at 769 n. 2 (citations omitted).

One of the most interesting questions posed in regard to 801(d)(2) admissions is the extent to which production of documents in response to interrogatories, as permitted under F.R.Civ.P. 33(c), constitutes an "admission of" or "adoption of" the contents of the documents so produced. Written answers to interrogatories may be utilized as admissions,[66] although they are not conclusive on the issues addressed.[67] We agree with the Court in *National Research Development Corp.*

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under a written consulting agreement, under which he contracted, among other things, to "aid the sale and promotion of the products" and not to perform any of the services specified for any other company. 362 F.2d at 926. Thus, *Article of Drug* follows the "advance adoption" pattern suggested by McCormick, *supra*, and is quite distinct from the situation in which an employee of one company supposedly adopts a diary of an employee of another company after being shown only a short segment of it.

[66] *Lumbermens Mut. Ins. Co.* v. *Cantex Mfg. Co.*, 262 F.2d 63, 67 (5th Cir. 1958) (defendant insurance company's interrogatory answer admitted the amount of plaintiff's losses and thus constituted a liquidation of the claim as of the date the answer was filed); *Brayton* v. *Crowell Collier Pub. Co.*, 205 F.2d 644, 646 (2d Cir. 1953); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F.Supp. 914, 954 (S.D.N.Y. 1965) (defendant's answers to interrogatories from an Eastern District of Pennsylvania case admitted). *See also Gadaleta* v. *Nederlandsch-Amerekaansche Stoomvart*, 291 F.2d 212, 213 (2d Cir. 1961).

[67] *Giraffa* v. *Moore-McCormack Lines, Inc.*, 270 F.Supp. 342 (S.D.N.Y.1967) (interrogatory answer which referred to a contract purportedly covering injured worker was admitted as evidence, but was rendered nugatory by countervailing evidence).

v. *Great Lakes Carbon Corp.*, 410 F.Supp. 1108 (D.C.Del.1975) that "the language of each interrogatory and the wording of the corresponding reply becomes significant" when it is not the written answers themselves, but documents referenced in the answers or produced in lieu of such answers, which the opposing party seeks to use.

In the *National Research* case the plaintiff sought to introduce an inventor's notebook to support its contentions concerning the meaning of a technical term used in a patent. Although the information plaintiff wished to use was apparently on a page of the notebook which had been referenced by defendants in their answers to interrogatories, the Court concluded that the broad and alternative wording of the questions created an "ambiguity in the interpretation of the corresponding response" which rendered it impossible to determine whether any "adoptive connotation" existed. As a second ground for exclusion, the court noted that the question asked did not concern the use of the term involved, and stated that the scope of any "admission," if one existed, "would be narrowly limited by the wording" of the question, and would neither constitute a concession of any other points nor "embrace the truth of the designated documents' total contents."[68]

We conclude that for a document produced under F.R.Civ.P. 33(c) to qualify as an admission, the question and answer when taken together must manifest an "adoptive"

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[68] 410 F.Supp. at 1114 n. 20. The Court also mentions the availability of other procedures for obtaining the desired evidence:

> Finally, assuming no financial constraints on defendants they could have utilized the procedures available under Fed.R.Civ.P. 28(b) to take the depositions in England of the non-resident non-party inventors and subsequently introduced the inventors' deposition under Fed.R.Civ.P. 32(a)(3). Alternatively during such depositions, the defendants could have developed a record sufficient to indicate that the inventor's notebook satisfied the requirements of the business records exception to the hearsay rule of 28 U.S.C. § 1732(a). However, the record presently before the Court indicates that such efforts were apparently not undertaken.

rather than merely a "referential" connotation. Further, the only issues conceded by such an "admission" are issues specifically addressed in the question, and responded to by the document.

The plaintiffs contend that certain documents are adoptive admissions because of a party's or a person's failure to disavow the documents. The Advisory Committee Notes to 801(d)(2)(B) recognize the possibility of an adoption by silence and state that "the theory is that the person would, under the circumstances, protest the statement made in his presence if untrue." The Notes caution, however, that the inference is a fairly weak one. In *United States* v. *Flecha*, 539 F.2d 874 (2d Cir. 1976), the Second Circuit held that the facts that a party has heard a statement and that he has failed to deny it are not in themselves sufficient to establish adoption by silence, but that the circumstances involved must be considered. The court of appeals quoted Lord Justice Bowen in *Wiedemann* v. *Walpole*, 2 Q.B. 534, 539 (1891):

> Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.

539 F.2d at 877. We agree.[69]

Another disputed point is whether a statement which is written by someone else but signed by a party opponent or his agent constitutes an admission of the party under 801(d)(2)(B).

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[69] Some of the circumstances which might render it *im*probable that the party would deny a statement if untrue are, for example: the party is in official custody; the declarant's statement is ambiguous, *United States* v. *Flecha, supra;* the party would not have the requisite knowledge to deny the statement; the statement is made by a person to whom the party would be unlikely to respond (*e.g.*, a drunk, an unknown bystander); the party was in a mentally impaired state (*e.g.*, asleep, excited, confused, in pain), 4 Weinstein ¶ 801(d)(2)(B)[01] at 801-145; the party has no motive to respond, or has not heard or understood the statement, 4 Wigmore § 1062 at 117; the statement is made in the course of a judicial proceeding, where decorum prevents immediate response, 4 Wigmore § 1072 at 125. Since plaintiffs rely upon defendants' failure to deny statements made at the JFTC proceedings, this last circumstance is particularly significant.

In a criminal case, *United States* v. *Johnson*, 529 F.2d 581, 584 (8th Cir.), *cert. denied*, 426 U.S. 909, 96 S.Ct. 2233, 48 L.Ed.2d 835 (1976), the Court of Appeals upheld the trial judge's admission of a statement made by the defendant, taken down in longhand by a Secret Service Agent, and read and signed by the defendant at the conclusion of his interview with the agent. With respect to the hearsay aspects involved, the court stated:

> The objections must fail. A statement which is reduced to writing by one other than the accused is generally admissible where the accused reads it over and signs it. *See United States* v. *Evans*, 320 F.2d 482, 484 (6th Cir. 1963); *United States* v. *Del Porte*, 357 F.Supp. 969, 976 (S.D.N.Y.), *aff'd* 483 F.2d 1399 (2nd Cir. 1973). Moreover, under the *Federal Rules of Evidence*, which became effective on the date of Johnson's trial, the statement is not hearsay. Fed.R.E. 801(d)(2)(A), (B).

We find no cases or commentary to the contrary.[70]

4. *Authorized Statements*

Subsection (C) of 801(d)(2) is mainly a codification of prior common law, under which an authorized statement by a party's agent was receivable to the same extent as the authorizing party's own statement. Wigmore explains that the basis for this rule is the principle that:

> [h]e who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

IV Wigmore § 1078 at 162 (Chadbourn rev. 1972). The "speaking authority" required by subsection (C) may represent either express or implied authority, and the authority questions involved are to be determined under the law of agency. *Baughman* v. *Cooper-Jarrett*, 530 F.2d 529, 532 (3d Cir.), *cert. denied*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976).

The Advisory Committee Notes state that the wording of Rule 801(d)(2)(C) was intended to resolve a division among the circuits as to whether an agent's statements were only admissible if made to a third person, or whether statements to the principal himself or itself could also be authorized admissions. *See United States* v. *Lykes Bros. Steamship Co.*, 432 F.2d 1076, 1078 (5th Cir. 1970) (citing cases from several circuits on both sides of the dispute). Prior to the adoption of the Rules, the Third Circuit had held that an employee's statement made to his employer rather than to a third party could not constitute an admission by the employer. *Nuttall* v. *Reading Co.*, 235 F.2d 546, 550 (3d Cir. 1956). The Advisory Committee Notes to Rule 801(d)(2)(C) make it clear that under that Rule a statement may be an authorized admission even though it was never communicated to a third party. Thus we view *Nuttall* as legislatively overruled on this point by the enactment of the Federal Rules of Evidence.

5. *Vicarious Admissions*

As we have mentioned, subsection (D) represents a departure from the common law. As the Advisory Committee Notes state, the traditional test was whether the statement was made by the agent within the scope of his employment. They pointedly note that few agents were employed to make damaging statements, and thus most such remarks were excluded. The Rules, however, follow a trend which allows statements to be admitted so long as they are related to a matter which is within the scope of the agent's employment. Advisory Com-

[70] *See also United States* v. *Williams*, 571 F.2d 344 (6th Cir. 1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). In that case, a Secret Service agent questioned a witness and prepared a statement which the witness subsequently signed. In holding that the statement was "adopted" by the witness and thus admissible under 803(5), the court cites the Senate Report explaining the House amendment to the Rule, which added the phrase "or adopted by the witness":

> When the verifying witness has not prepared the report, but merely examined it and found it to be accurate, he has adopted the report, and it is therefore admissible.

Senate Report, 4 U.S.Code Cong. & Admin. News at p. 7074 (1974). There is no reason to believe that Congress intended any different approach to adoptions under 801(d)(2)(B).

mittee Notes to 801(d)(2)(D). The phrase "during the existence of the relationship" makes it quite clear that the statement must relate to a matter which was within the agent's scope of employment at the time he made the statement. Thus, we must exclude statements made after the termination of employment, or about matters with which an employee was not, or was no longer, involved.

The defendants have argued that two additional criteria must be met to satisfy 801(d)(2)(D): first, the statement must have been communicated to someone outside of the company which employed the declarant, and second, the declarant must be an employee with managerial responsibility. Since neither of these requirements are found in the language of the Rule, or in the Advisory Committee Notes, the defendants base their contention on two pre-Rules cases, *Nuttall* v. *Reading Company*, 235 F.2d 546 (3d Cir. 1956), and *Gilmour* v. *Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D.Pa.), *aff'd mem.* 521 F.2d 1398 (3d Cir. 1975).

The *Nuttall* case was decided on the basis of the "authorized" admission exception, discussed *supra*. As we stated there, the Advisory Committee Notes to Subsection (C) make it clear that under that Rule there is no requirement that a statement must be communicated outside of the company against which it is offered. In *Gilmour*, Judge Broderick quoted *Nuttall*, but recognized that the then proposed Rule 801 might alter the common law rule, and decided the issue on other grounds.

The defendants acknowledge that the *Nuttal* rule is no longer valid with respect to authorized admissions under subsection (C), but contend that it retains force with respect to vicarious admissions under subsection (D), since the only discussion of the issue is in the Advisory Committee Notes to subsection (C). We reject that contention. It is plain that the committee viewed subsection (D) as an extension of common-law authorized admissions, which were codified in subsection (C). Thus the discussion in the note to subsection (C) of

whether a statement must be communicated to a third party is equally applicable to subsection (D), as the Eighth Circuit expressly held in *Mahlandt*, *supra*, 588 F.2d at 630. We conclude that *Nuttall* retains no vitality with respect to either type of admission.

The defendants also contend that a vicarious admission can be made only by an employee who has managerial responsibilities. This requirement is found only in decisions concerning who is authorized to make an admission for a corporate employer. *See Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950); *Gilmour*, *supra*, 66 F.R.D. at 150. Thus the requirement of managerial responsibilities, if it remains valid after the enactment of the Rules, is pertinent only to authorized admissions, not to vicarious admissions. In any event, it is clear that every employee whose statements the plaintiffs offer did have managerial responsibilities.

6. *Admissions of a Subsidiary Corporation Offered Against the Parent Corporation*

Since the plaintiffs offer DSS 1029, the so-called Japan Victor document, against MEI on the basis of MEI's ownership of the majority of the stock of Japan Victor Co., a brief word is in order about the attribution to a parent corporation of a statement which would be an admission if offered against its subsidiary.[71] The facts and contentions surrounding the document are adequately stated in Part XIII, *infra*, and will not be restated here.

The issue to be considered is whether, assuming that a statement could come into evidence as an admission against the subsidiary, it may likewise be admitted into evidence against

[71] Similar issues are presented by plaintiffs' proffer of other documents: (1) the protocol of Mr. Maekawa, who at the time of giving his protocol was an employee of Nagoya Sharp Sales Corp., a non-defendant which plaintiffs apparently characterize, without foundation, as a subsidiary of Sharp Corporation; and (2) the EIAJ "Minutes," which plaintiffs offer as admissions against the defendants on the basis of their unsupported allegations that the defendants control the EIAJ, a Japanese trade organization.

the parent corporation. While there is no precedent precisely on point, we think the answer is clear: the proponent of the evidence must show either that the subsidiary had authority to make a statement concerning the subject, under Rule 801(d)(2)(C), or that the subsidiary acted as the parent's agent and the statement concerned a matter within the scope of its agency, under Rule 801(d)(2)(D). Under either subsection of the rule, the proponent of the evidence must establish the existence of an agency relationship between the parent and the subsidiary under the applicable principles of agency law.

The principles relevant to deciding whether or not a subsidiary is the agent of a parent corporation have recently been reviewed by Judge Caleb Wright in *Japan Petroleum Co. (Nigeria) Ltd.* v. *Ashland Oil Co.*, 456 F.Supp. 831, 840-41 (D.Del. 1978):

> Whether an agency relationship exists between a parent corporation and its subsidiary is normally a question of fact. The central factual issue is control, *i.e.*, whether the parent corporation dominates the activities of the subsidiary.
>
> In order to determine whether or not a sufficient degree of control exists to establish an agency relationship, the Court must look to a wide variety of factors, such as stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary's business and assets.

(citations and footnote omitted). *See also Walker* v. *Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979); *Pacific Can Co.* v. *Hewes*, 95 F.2d 42 (9th Cir. 1938); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841 (N.D.Cal. 1979).

As Judge Wright noted, the existence of an agency relationship is a conceptually distinct question from the notion of "piercing the corporate veil." 456 F.Supp. at 839. However,

the mere fact that one corporation owns a controlling interest in another does not render the subsidiary the agent of the parent:

> "A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other". *Restatement (Second) of Agency, supra* § 14M. *See also, Pacific Can Co., supra*, 95 F.2d at 46; *Eastern Industries [Inc.* v. *Traffic Controls, Inc.], supra*, 142 F.Supp. [381] at 384 [D.Del.]; *Owl Fumigating Corp.* v. *California Cyanide Co.*, 24 F.2d 718, 719 (D.Del. 1928), *aff'd.*, 30 F.2d 812 (3d Cir. 1929); *Scott-Douglas Corp.* v. *Greyhound Corp.*, 304 A.2d 309, 314 (Del.Super. 1973). Nor does the fact that a parent and a subsidiary have common officers and directors necessarily indicate an agency relationship. *See, Pacific Can Co., supra; Eastern Industries, supra; Owl Fumigating, supra; Scott-Douglas, supra.*

456 F.Supp. at 841.

We agree with Judge Wright's analysis, and adopt it. In the absence of any showing of express authority, we think that the plaintiffs, as proponents of the evidence, should be required to make the same kind of showing as would be required to impose vicarious liability upon the parent corporation: that the parent corporation "directly intervenes in the management" of the subsidiary so as to treat it as a "mere department of its own enterprise." *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 524, 61 S.Ct. 675, 685, 85 L.Ed. 982 (1940). In conformity with the overall organization of this opinion, we defer our discussion of the facts pertaining to the relationship between MEI and the Japan Victor Company until Part XIII, *infra*.

D. *804(b)(1) Former Testimony*

Plaintiffs seek to introduce into evidence under Rule 804(b)(1) the prior testimony of approximately 16 witnesses,

employees of the Japanese manufacturer defendants, who testified before the JFTC in the 1966 "Six Company Case." Rule 804(b)(1) provides:

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

If admitted, the testimony would be offered against the six defendants who were present at the JFTC Six Company Case hearings to prove a conspiracy to fix prices in Japan, the home market aspect of the alleged "unitary conspiracy." It would also be offered against all other defendants on the ground that the "six companies" are their predecessor in interest. Moreover, plaintiffs propose to offer the testimony against all defendants insofar as it authenticates the diaries. Defendants object to the admission of the former testimony on the grounds that plaintiffs have failed to show; (1) that the declarants are "unavailable" as witnesses in the present trial, within the meaning of Rule 804(a); (2) that the six defendants who were respondents in the Six Company Case had a "similar motive to develop the testimony" in the JFTC hearings; and (3) that those six defendants qualify as "predecessors in interest" of the other eighteen defendants who were not represented at the JFTC hearings. We discuss the legal aspects of these issues in the order mentioned.

1. *Unavailability*

a. *Introduction*

The first requirement for application of all the Rule 804 hearsay exceptions, including 804(b)(1), is that the declarant

be unavailable.[72] Unavailability is defined in Rule 804(a) as follows.

> (a) Definition of unavailability.—
>
> "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Rule 804(a) codifies the historically diverse bases for finding a witness "unavailable" for the purpose of admitting (under subsection (b) of the rule) evidence otherwise excluded by the hearsay rule. The burden of demonstrating unavailability falls, of course, on the proponent. 11 Moore's Federal Practice § 804.02 at 239.

Plaintiffs contend that the witnesses whose testimony they seek to introduce are unavailable within the meaning of subsections (3), (4), and (5) of 804(a). Plaintiffs' only claim under

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[72] As will be seen *infra*, the requisites for proving unavailability for purposes of 804(b)(1) differ somwhat from those under 804(b)(2)(3) & (4).

804(a)(4) is that one of the declarants, Mr. Yajima, is unavailable because of his death in 1968, prior to commencement of this litigation. The defendants concede that Yajima is dead, hence unavailable, so that a discussion of 804(a)(4) is unnecessary. We can defer our discussion of 804(a)(3) until we reach the discussion of other hearsay exceptions because we find that the 804(a)(5) requirement is satisfied with respect to former testimony, and that is sufficient to establish unavailability.

b. *Inability to Procure Attendance Under Rule 804(a)(5)*

Rule 804(a)(5) provides that a declarant of former testimony is unavailable if the proponent "has been unable to procure his attendance . . . by process or other reasonable means." In civil cases, it has long been the rule that inability to procure attendance by "process or other reasonable means" is satisfied by demonstration of inability to serve a subpoena. 4 Weinstein ¶ 804(a)[01] at 804-41; Saltzburg at 600; McCormick § 253 at 609; *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d 35, 42 (2d Cir. 1972); *McIntyre* v. *Reynolds Metals Co.*, 468 F.2d 1092, 1093 n.2 (5th Cir. 1972); *United States* v. *Squella-Avendano*, 478 F.2d 433, 439 (5th Cir. 1973). We have found nothing to indicate that the adoption of the Federal Rules of Evidence altered this longstanding rule.

The declarants in this case, Japanese citizens living in Japan, are beyond the subpoena power of this court as governed by Fed.R.Civ. P. 45(e). The statute governing federal courts' subpoena power over persons in a foreign country, 28 U.S.C. § 1783, extends that power only to "a national or resident of the United States" in a foreign country, and therefore plainly does not reach Japanese citizens residing in Japan. Nor do we find in Rule 804(a)(5) any requirement that plaintiffs seek the voluntary attendance of witnesses residing abroad whose attendance cannot be compelled by process. It would be anomalous to apply in a civil case a requirement which the Supreme Court has found inapposite under the stricter standards applied in criminal cases. *See Mancusi* v. *Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

Rule 804(a)(5) is written in the disjunctive. The rule, as promulgated by the Supreme Court, required only a showing of inability to procure *attendance* of the declarant with respect to all the 804(b) exceptions. However, the House Judiciary Committee added language to the Rule which provides that "in the case of a hearsay exception under subdivision (b)(2), (b)(3), or (b)(4)," a proponent must also be unable to procure the *testimony* of the declarant. The House Committee noted:

> the amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognizes the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subsdivision (b)(1).

House Report at 15, U.S.Code Cong. & Admin.News 1974, p. 7088. While the Senate deleted the language added by the House, the Conference Committee adopted the House version. Thus, in the Rule as enacted, there is no additional requirement that a proponent of former testimony attempt to depose the declarant.

Although the Senate Judiciary Committee rejected the House amendment, the Committee expressed its view that if the proponent of hearsay evidence had in fact *taken* the declarant's deposition, the proponent's failure to ask certain questions at the deposition might estop him from claiming subsequently that the declarant was unavailable at trial. The Committee stated:

> The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the [hearsay] statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to

> process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Senate Report, U.S.Code Cong. & Admin. News 1974, p. 7067. Although the House amendment imposed an attempt-to-depose requirement upon subsections (b)(2), (b)(3), and (b)(4), it did not alter the proposed rule with respect to former testimony. Defendants contend that the Senate Committee's "estoppel" position therefore remains applicable to the proponent of former testimony under subsection (b)(1).

The plaintiffs did not in fact depose the declarants of the diaries and memos written in Japan. However, they *did* depose other officials of the companies which employ or employed the declarants in Japan. Those depositions (in two waves) related first to personal jurisdiction, venue, and service of process, and second, to identification of documents produced in discovery. The defendants contend that application of the Senate "estoppel" guideline bars the plaintiffs from claiming that the declarants are now unavailable. They argue that the plaintiffs had ample opportunity to depose the declarants when they deposed the Japanese defendants. Moreover, they say, in such depositions as were taken plaintiffs did not confront the deponents with issues addressed in the testimony of their employees in the JFTC proceedings and did not attempt to elicit foundation for the admissibility of any of the documents produced. Plaintiffs, in response, do not address the application of Senate guidelines, but maintain that a literal construction of the rule renders a proponent of 804(b)(1) testimony exempt from any requirement of attempting to take depositions.

We cannot accept the defendants' reading of the Senate Committee's comment. First, it must be noted that the Senate Committee guidelines address fairness questions which would arise under the rule *as promulgated by the Advisory Committee*. Unlike that proposed rule, the rule as enacted makes a distinction between former testimony and the other 804(b) exceptions. We cannot speculate as to what the Senate Committee would have said in direct response to the rule thus drawn.

Even if the Senate Committee's view retains some vitality in the construction of the rule as enacted, the extension of the Senate guideline which defendants propose is contrary to the plain language of the rule itself. The defendants in effect contend that the Senate report should be read to impose on plaintiffs a requirement of taking depositions which they might not otherwise take, while the Senate report itself speaks only of a party's willful failure to ask certain questions at a deposition which he has taken voluntarily. To read the Senate report as broadly as the defendants propose would be in effect to impose a requirement that the proponent of former testimony must take the deposition of the declarant, even though the rule as enacted clearly distinguishes in this regard between former testimony and the categories of hearsay treated in subsections (b)(2), (b)(3), and (b)(4). Thus we conclude that the declarants of former testimony are unavailable under Rule 804(a)(5) if they are outside the subpoena power of the court, even if the proponent of the former testimony has made no effort to take their depositions or to request their voluntary attendance at trial.

2. *Similiarity of Motive*

In addition to meeting the requirement of unavailability, former testimony under 804(b)(1) must have been given under circumstances such that "the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." It is uncontroverted that the respondents in the JFTC proceedings had an opportunity to develop the witnesses' testimony, as they were represented by counsel who engaged in

extensive examination of the witnesses.[73] In this section, we discuss the requirement of similarity of motive to develop the testimony, and in the following section we turn to a discussion of what renders one party a "predecessor in interest" of another.

At common law, the hearsay exception for former testimony originally required identity of parties *and* identity of issues. Both were intended to insure the adequacy of the present opponents' opportunity to cross-examine the witness in the prior proceeding. Gradually the courts reduced these requirements to "predecessor in interest" and "substantial" identity of issues.[74]

Abandoning the old requirement of identity of issues, the Supreme Court promulgated, and the Congress adopted, the term "similar motive" in Rule 804(b)(1). The Advisory Committee explained its preference as follows:

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable.

Advisory Committee Note to Rule 804. The rule thus embodies McCormick's view that the requirement of identity of issues "should be restated, not as a mechanical one of identity or even

[73] Defendants do argue that there was no *realistic* opportunity to develop the testimony because prior opportunity to examine on particular facts is insufficient if those facts are not probative of substantially the same issue in the present case. However, as this argument goes to similarity of issues, it in effect is dealt with in the following discussion of similarity of motive which is a function thereof. We will confine our discussion to "similar motive" rather than "opportunity," since the semantic distinction may be artificial and in any event is of no great moment.

[74] *See* McCormick § 256; Weinstein ¶ 804(b)(1)[04].

of substantial identity of issues, but rather as a requirement that the issues in the first proceeding and hence the purpose for which the testimony was there offered, must have been such that the present opponent (or some person in like interest) had an adequate motive for testing on cross-examination the credibility of the testimony now offered." McCormick § 257 at 622.

That similar motive is predicated, at least in part, upon the substantial similarity of issues and purpose for which testimony is offered is clear. But motive may also be influenced by other factors. As Saltzburg observes:

> While common law jurisdictions require substantial identity of issues, the Federal Rule does not depart from the common law in its requirement of a similar motive to develop the testimony. *The way to determine whether or not motives are similar is to look at the similarity of the issues and the context in which the opportunity for examination previously arose.*

Saltzburg at 602.

Such circumstances or factors which might influence motive to develop testimony include (1) the type of proceeding in which the testimony is given,[75] (2) trial strategy,[76] (3) the potential penalties or financial stakes,[77] and (4) the number of issues and

[75]
> In many of the cases the former testimony was given at a preliminary hearing, and an argument can be made that strategy often dictates little or no cross-examination at that stage, since ample opportunity will be afforded at trial. However, the argument has not been received favorably by the courts.

McCormick § 255 at 616 (footnotes omitted).

[76] *See United States* v. *Franklin*, 235 F.Supp. 338 (D.D.C. 1964), where it was held that as a tactical matter, effective cross-examination in a prior proceedings was not possible.

[77]
> A discrepancy in the financial stakes involved in the two cases may also affect motive. An action in small claims court may not be defended with the same vigor as an action where considerably more is involved.

Weinstein ¶ 804(b)(1)[04] at 804-66.

parties.[78] Thus in determinig whether a party or his predecessor in interest had the opportunity and similar motive to develop the testimony, the court must evaluate, in terms of both the prior and the present proceedings (1) the similarity of issues, (2) the purpose for which the testimony is offered, and (3) the context or circumstances in which the testiony is given.

3. *The Meaning of "Predecessor in Interest".*

Rule 804(b)(1) permits the introduction into evidence of prior testimony against a party which was not represented in the earlier action, so long as there was in the earlier action a "predecessor in interest" of the present party, whose motive to develop the testimony in the earlier action was sufficiently similar to that of the present party to satisfy that requirement of the rule. The plaintiffs offer the JFTC testimony against all defendants in this action, arguing that the six respondents were "predecessors in interest" of the other defendants.

The meaning of the phrase "predecessor in interest" in Rule 804(b)(1) is somewhat confused because the relevant legislative history is ambiguous. As we have noted, the original common law rule concerning the admissibility of former testi-

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[78] Although all the issues need not be the same in the two proceedings and the existence of additional issues in one of the cases is immaterial so long as the motive with which the testimony was developed is similar, the presence of additional issues may affect motive, particularly when additional parties are also involved.

Weinstein *id.* at 804-06. In *Wolf* v. *United Air Lines, Inc.*, 12 F.R.D. 1 (M.D.Pa. 1951), the court excluded depositions taken in prior actions against two co-defendants. Because the instant action involved only one of those defendants, the court concluded "under the prevailing circumstances the interest and motive of United Air Lines in its direct and cross-examination may very well not have been the same at that time as it is now in an action in which Douglas is not a party." *Id.* at 3-4. In *First National Bank* v. *National Airlines, Inc.*, 22 F.R.D. 46, 48 (S.D.N.Y. 1958), depositions taken in an action formerly brought against National Airlines only were excluded as against National and Douglas, the co-defendants in the case at bar. The court held that the depositions could not be offered against Douglas, applying the standard of identity of parties and identity of issues, and ruled that it would be impractical to expect the jury to consider the evidence only against National.

mony required identity of parties in the two proceedings. Prior to the enactment of the Federal Rules of Evidence, however, many courts and commentators had taken the position that the requirement of identity of parties should be relaxed. For example, Wigmore proposed that the inquiry should be only "whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has." 5 Wigmore on Evidence § 1388 at 111 (Chadbourn ed. 1974).

The Supreme Court followed the Wigmore position in its original submission of Rule 804(b)(1), making prior testimony admissible if a person with "motive and interest similar" to the party against whom it is offered had an opportunity to examine the witness. The House Judiciary Committee reinstated the traditional "predecessor in interest" language with the following rationale:

> Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the rule to reflect these policy determinations.

House Report at 15, U.S.Code Cong. & Admin. News 1974, p. 7088. Thus it appears that the House Committee intended that the phrase "predecessor in interest" be construed narrowly, a position that is consistent with the common law meaning of the term.[79]

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[79] Black's Law Dictionary (5th ed. 1979) defines "predecessor" as "the correlative of 'successor,' " *id.* at 1060, and defines "successor in interest" as follows:

> One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same

The Senate Judiciary Committee accepted the House amendment to the Supreme Court's proposed rule. It put its own gloss on the phrase "predecessor in interest," however, by means of the following comment:

> The House amended the rule to apply only to a party's predecessor in interest. Although the Committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

Senate Report at 28, U.S.Code Cong. & Admin. News 1974, p. 7074. Thus it seems that the Senate Committee intended that the statutory phrase "predecessor in interest" be broadly construed as essentially similar to the Supreme Court's proposed rule. In contrast, as we have noted, the House Committee apparently intended that the phrase be construed narrowly in accordance with its common law meaning. While both houses of Congress enacted the same language, they differed in their views of the meaning of that language.

In *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978), a majority of a Third Circuit panel adopted the Senate view of the phrase "predecessor in interest." Referring to the Senate Report quoted above, the court of appeals stated, "we, too, fail to see a compelling difference between the two approaches." *Id.* at 1185. The *Lloyd* majority added:

> We do not accept the view that this change in wording signalled a return to the common law approach to former testimony, requiring privity or a common property interest between the parties.

> rights as original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a "successor in interest." In case of corporations, the term "successor in interest" ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

Id. at 1283-84 (citations omitted). *See also Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179, 1191 (3d Cir.) (Stern, D.J., concurring), *cert. denied* 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) ("predecessor in interest" traditionally defined in terms of privity).

Id. at n.5. *Lloyd* was an action by a crewman (Alvarez) against the shipowner (Export) for injuries sustained in a fight with a fellow crewman (third party defendant Lloyd). Alvarez alleged that Export failed to protect him from Lloyd after Export had knowledge of Lloyd's dangerous propensities. The trial court excluded former testimony given by Lloyd in a Coast Guard hearing which sought to determine culpability in the altercation between Lloyd and Alvarez. The testimony was offered by Export against Alvarez and the question on appeal was whether the Coast Goard examiner was a "predecessor in interest" of Alvarez in terms of 804(b)(1).

Reasoning that there was the same "nucleus of operative facts" and the same "basic interest advanced" by both the Coast Guard examiner and Alvarez, the court concluded that the examiner was a predecessor in interest, stating:

> While we do not endorse an extravagant interpretation of who or what constitutes a "predecessor in interest," we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as "the practical and expedient view" expresses the congressional intention: "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present part." *Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.*

Id. at 1187 (emphasis added) (footnote omitted).[80]

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[80] There is some authority for a narrower construction of the phrase "predecessor in interest," which would follow the view of the House Committee. Another court, considering the same issue shortly before *Lloyd*, adopted a much narrower definition of "predecessor in interest." *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 444 F.Supp. 110, 113 (N.D. Cal. 1978). And in *Government of Canal Zone* v. *Pinto*, 590 F.2d 1344 (5th Cir. 1979), a criminal case discussed in the text *infra*, Judge Wisdom commented that, "[e]ven for civil cases, the draftsmen of the Federal Rules *rejected* the theory that subjecting testimony to the questioning of a person who is not a party at the trial, *although he has like motive and interest*, will furnish a guarantee of trustworthiness equal to that of cross-examination by

In our view, it is highly significant that the "previous party" in *Lloyd* was a government investigator, presumably impartial, who had no role in the subsequent legal action. The *Lloyd* court itself commented on the community of interest that the government, as representative of the public, and an individual might share:

> [O]ur analysis of the concept of interests satisfies us that there was a sufficient community of interest shared by the Coast Guard in its hearing and Alvarez in the subsequent civil trial to satisfy Rule 804(b)(1). . . . The interest implicated here was a claim or desire or demand which Alvarez as an individual, and the Coast Guard as a representative of a larger group, sought to satisfy . . .
>
> Individual interests, like those of Alvarez, are involved immediately in the individual life. . . . Public interests, like those of the Coast Guard, are involved in the life of a politically organized society, here the United States, and asserted in title of that entity. Thus, Alvarez sought to vindicate his individual interest in recovering for his injuries; the Coast Guard sought to vindicate the public interest in safe and unimpeded merchant marine service.

Id. at 1185-86 (footnotes omitted).[81]

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the one against whom the evidence is introduced." *Id.* at 1354 (emphasis added). Moreover, the panel in *Lloyd* was divided and District Judge Herbert J. Stern, sitting by designation, disagreed with the majority's construction of the phrase "predecessor in interest," although he concurred in the result. One commentator has called Judge Stern's opinion "persuasive." Saltzburg at 231 (1980 Supp.). We are bound, however, by the opinion of the panel majority in *Lloyd*.

[81] A similar emphasis upon the special relationship between the government and an individual is apparent in *In Re Master Key Antitrust Litigation*, 72 F.R.D. 108 (D.Conn. 1976). In that case Judge Blumenfeld admitted testimony developed by the government in a prior antitrust case into evidence in a subsequent action brought by a treble damage plaintiff. He reasoned that: "Congress seems to have intended to relax the common law requirement of actual privity between the parties" and:

> In this case there are special considerations which weigh in favor of holding that the United States was a predecessor in interest of the present plaintiffs. The unique relationship between the Government's antitrust enforcement suits and the private actions which follow has

Entirely different considerations come into play when prior testimony is offered against one co-defendant on the basis of prior examination of the witness on behalf of a different co-defendant, when the two have potentially conflicting interests and litigation strategies. In *Government of the Canal Zone* v. *Pinto*, 590 F.2d 1344 (5th Cir. 1979), for example, testimony from a preliminary hearing was not admitted under 804(b)(1) against a defendant who was not represented at the hearing, even though the lawyer who later represented him at trial attended the prior hearing on behalf of his co-defendant and engaged in cross-examination on behalf of the co-defendant. Judge Wisdom commented that, "the reliability of preliminary hearing testimony is not assured by the mere fact of cross-examination but only by cross-examination designed to illuminate the accuracy of the statement as it concerns the *particular* defendant." *Id.* at 1353-54 (emphasis added).

The facts and circumstances of this case will require us to determine whether a sufficient "community of interest" between alleged co-conspirators exists to satisfy the *Lloyd* requirements for finding the six respondents in the JFTC proceedings to be "predecessors" of the other defendants in the present case. Under *Lloyd*, our inquiry is whether the six respondents had a "like motive to develop the testimony about the same material facts" as the other defendants would have had if they had been represented at the JFTC hearing. In applying the principles of *Lloyd* to the vastly different circumstances of this case, we must also bear in mind the House Judiciary Committee's admonition that it is "generally unfair" to impose upon the present party the "responsibility for the manner in which the witness was previously handled by another party." House Report, *supra*, U.S.Code Cong. & Admin.News 1974, p. 7088.

> Congressional recognition and ratification, which has in turn provided special benefits to the private plaintiffs. . . . Under these circumstances it is clearly not unfair to allow the defendants to submit the prior testimony of witnesses at that proceeding who are now unavailable.

Id. at 109, 110.

E. *Statements Against Interest Under Rule 804(b)(3)*

Plaintiffs seek admission of numerous documents as statements against the interests of both the declarants and their corporate employers. As we have noted, the 804(b) hearsay exceptions require a showing of unavailability of the declarants. Plaintiffs argue that the declarants are unavailable under Rule 804(a)(3) and (5) and, in the case of Mr. Yajima, under (a)(4) because of his death. Defendants reply that, except for Yajima, declarants do not meet any of the tests of unavailability under 804(a). They also contend that the substantive requirements of 804(b)(3) are not met here because: (1) the statements were not contrary to the declarants' pecuniary or proprietary interests, nor did they tend to subject the declarants to civil or criminal liability, within the meaning of the rule; and (2) plaintiffs have failed to show awareness by each declarant of the implications of his statement such that a reasonable man would not have made them unless he believed them to be true. We consider first the issues relating to unavailability for purposes of Rule 804(b)(3).

1. *Unavailability*

a. *Inability to Procure Testimony Under Rule 804(a)(5)*

The standard of unavailability which is imposed by Rule 804(a)(5) on the proponent of declarations against interest is more rigorous than that imposed on the proponent of former testimony. As applied to 804(b)(3), the parenthetical clause of 804(a)(5) dictates that a witness is unavailable if he is absent from the hearing and the proponent of his statement is unable to procure his "attendance *or testimony*" (emphasis added). While we have ruled that the plaintiffs are unable to procure the attendance of Japanese citizens residing in Japan, pp. 1248-1252, *supra*, the proponent of declarations against interest is required to meet a higher standard by seeking the witness' *testimony* before hearsay evidence may be admitted. The legislative history of Rule 804(a)(5) has been reviewed in detail, *supra*. It is perfectly clear that the House Judiciary Committee, which added to the rule the parenthetical language applicable to subsection (b)(3), intended thereby to require that the proponent of such evidence attempt to depose the absent witness. There is an express statement of that intention in the House report, quoted at p. 1250, *supra*. Since the plaintiffs made no effort to depose any of the declarants, none of the declarants (except Yajima) are unavailable under 804(a)(5) for purposes of the hearsay exception for declarations against interest.

b. *Lack of Memory Under Rule 804(a)(3)*

Plaintiffs submit that the witnesses before the JFTC are unavailable under Rule 804(a)(3) because of lack of memory of the subject matter of their testimony and protocols and diaries. Notwithstanding the wording of the rule, which requires that lack of memory be established by the testimony of the declarant, plaintiffs seek to establish lack of memory by certain answers to interrogatories addressed to the declarants' *employers*. When plaintiffs asked for details of meetings among competitors in nos. 42, 43 and 44 of plaintiff NUE's Second Set of Interrogatories, the defendants are said to have answered to the effect that they had no knowledge or information aside from the documents which they produced. Those documents, produced under F.R.Civ.P. 33(c), included the JFTC testimony and protocols and diaries. Plaintiffs argue that under Federal Rule of Civil Procedure 33(a), corporations are bound to inquire of their employees before making a corporate response, and that a corporation's answers are deemed to represent the findings of those inquiries. They claim that the answers should therefore be treated as representations of the declarants themselves, who are defendants' employees, that they are unable to remember the subject matter of the statements, hence are unavailable with 804(a)(3).

Defendants contend, correctly, that there is no evidence that the declarants themselves are unable to recall the subject matter of the testimony and protocols. Except for Yajima, all the declarants are alive, well and still in the employ of the respective manufacturing defendants. Yet they have never

been asked whether or what they remember, because they have never been deposed. Rule 804(a)(3) provides that a declarant is deemed unavailable when he "testifies to a lack of memory of the subject matter of his statement." Defendants argue that Rule 804(a)(3) means what it says, *i.e.*, that the declarant is unavailable only when he "testifies to a lack of memory." Their position is supported by the Advisory Committee Note, which observes that "the practical effect" of a claimed lack of memory is to put present testimony "beyond reach," and notes that "the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination."

Despite the clear requirement of the rule that lack of memory must ordinarily be proved by testimony of the declarant, we might still find that the defendants were estopped to deny their employees' lack of memory, if their interrogatory answers clearly asserted that the declarants lacked memory, or even if the answers clearly asserted that the defendant corporations as institutions lacked memory of the pertinent subject matter.[62] However, we do not think that the relevant in-

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[62] Rule 33(a) of the Federal Rules of Civil Procedure, in its provisions for serving and answering interrogatories to corporations, states that whatever officer or agent of the corporation is chosen to answer on behalf of the corporate party, he must "furnish such information as is available to the party." Since this language was added in 1946, the rule has been construed to place on the responding corporation a duty to inquire of appropriate employees before submitting its answers. *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). *See also Hornung* v. *Eastern Auto. Forwarding Co.*, 11 F.R.D. 300 (N.D.Ohio 1951); *Drum* v. *Town of Tonawanda*, 13 F.R.D. 317 (W.D.N.Y. 1952). A corporation's answers must speak as of the composite knowledge of the party and include facts and knowledge of its agents and any person under its control. 4A Moore's Federal Practice ¶ 33.07 at 44 and ¶ 33.26 at 143. The rationale underlying "corporate responsibility" to respond to interrogatories is obvious: in a large corporation, no single official is likely to have knowledge of the affairs of the entire corporate body. Responses to discovery which revealed only the knowledge of one individual would be useless in corporate litigation, where knowledge held by the corporate entity is sought.

terrogatory answers are susceptible of the interpretation which the plaintiffs seek to place upon them.

The pertinent interrogatories refer to the subject matter of the meetings in question as well as to dates and names of participants.[63] Interrogatory No. 42 asks defendant to:

> state the date or dates and identify the persons present at each meeting . . . during which there was any discussion, comment or reference to the prices, price levels or price formulae, rebates, discounts, allowances, or other terms or conditions of sale for television receivers.

No. 43 asks for identification of all documents and reports relating to or reporting these meetings. No. 44 asks for idenification (if a document) and description (if oral) of *each communication* between "you and other defendant or defendants, or any other manufacturer, seller, distributor, exporter or importer of television receivers" regarding pricing policies.[64] The defendants responded to these interrogatories

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In *General Dynamics*, for example, interrogatories were served on the defendant corporation, Selb. Selb's corporate Secretary Frey, designated by Selb to answer on behalf of the corporation, responded that he had "insufficient personal knowledge upon which he [could] base an answer and there are no other present employees or officers available to answer." The 8th Circuit held that under Rule 33(a) Frey, in acting for the corporation, was "duty bound to secure all information available to Selb, including information within the personal knowledge of past and present employees." *Id.* at 1210. Moreover, "knowledge of officers and employees of Selb Manufacturing, relative to the subject matter of the instant case, is imputed to the corporation itself." *Id.* at 1210. Generally, a duty to inquire carries the burden of being deemed to possess knowledge such as an appropriate inquiry would have yielded. *Cage* v. *New York Central Railroad Co.*, 276 F.Supp. 778, 787 (W.D.Pa.), *aff'd*, 386 F.2d 998 (3d Cir. 1967).

[63] We thus reject defendants' contention that the interrogatories on which plaintiffs rely to show lack of memory refer only to dates and names, rather than to the subject matter of the meetings.

[64] NUE included in its first set of interrogatories a list of definitions of terms, including:

> (3) "Describe" means to state and date and identify the persons involved in the transaction, communication, event, or occurrence in ques-

both by making massive document productions, and by written answers. Although the written answers of the defendants are not identical, the general tenor of most of the answers is that, apart from the documents produced to NUE, the defendant corporations were not aware of the matters discussed at meetings among competitors.[85]

Plaintiffs would have us read the written answers to NUE's interrogatories as representations that defendants' employees have no knowledge of the subject matters contained in the former testimony, "protocols," diaries, and memoranda. We find this to be an inappropriate and excessive interpretation of these responses. First, the written answers cannot be considered in isolation from the defendants' production of a large body of documents from which the names, dates and subject

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> tion, and of the transactions, communications, events or occurrence in question, and state the *nature and subject matter* of the transactions, communications, events or occurrence in question.

(emphasis added).

[85] For instance, responding to no. 42, Hitachi claimed that, except for references to certain meetings in documents produced for discovery, it had "no information as to the specific dates, persons present at or subjects discussed at meetings of trade associations or other groups." In answer to no. 44, Hitachi said that it was "aware of no such communication," and referred to its answer to no. 42. Toshiba responded to nos. 42, 43 and 44 by noting that the meetings were held irregularly and that it did not have information or documents identifying dates, persons or "the specific matters discussed at each meeting," other than in the documents produced. Matsushita gave similar negative responses; in its memorandum opposing NUE's motion for an order compelling answers to plaintiff's interrogatories, it further explained its answers by noting that it "could not recall the specific information requested for each such meeting and so stated that fact." In answering no. 44, MELCO said that except for routine correspondence, there were no other communications.

Several of the defendants responded to no. 44 by referring to their answers to no. 42. They now contend that in doing so, they did not opine as to the subject matter of the meetings, but only to names and dates as questioned by no. 42. Though no. 42 was so limited, interrogatory nos. 43 and 44 referred more broadly to documents and communications, and the defendants answered the latter interrogatory by incorporating by reference their answers to no. 42. Thus the fact that no. 42 was more limited in its scope than nos. 43 and 44 is of no consequence.

matters requested in the interrogatories could be gleaned. The production of documents itself contained much information—thousands of pages—but nowhere has there been a representation by defendants or their officials that they do not recall the subject matter of *those* materials.

Secondly, plaintiffs fail to show the necessity or prudence of accepting this second-hand evidence over depositions or in-court testimony. It would torture logic and the Federal Rules to conclude that, because corporations made limited responses as to knowledge of names, dates and facts, their officials should now be presumed forgetful of the myriad information contained in the several types of documents—without the plaintiffs ever questioning (deposing) those individuals at all. The unavailability requirement places a large burden on the proponent of the evidence to establish the necessity of foregoing individual testimony, with its circumstantial guarantees of reliability, in favor of inherently suspect and unclarified hearsay evidence. Since all but one of the relevant corporate officials (declarants) are alive and employed by defendants, the necessity of such forebearance is not readily apparent.[86] Accordingly, we hold that the plaintiffs may not avail themselves of 804(a)(3).

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[86] Implicit in the unavailability of the 804 exceptions is the mandate that the proponent of the evidence show the necessity of admitting the hearsay evidence. *See Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 396-97 (5th Cir. 1961); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 Harv. L.Rev. 1786, 1799 (1980). The 804 exceptions, "save that of former testimony, have fewer circumstancial guarantees of reliability than the exceptions in Rule 803." 11 Moore's Federal Practice § 804.02, p. VIII 239. Their trustworthiness must be rigorously guarded, and the hearsay evidence supplanted by the declarant's testimony whenever possible. Even where former testimony is introduced, "tradition, founded in experience, uniformly favors production of the witness if he is available." Advisory Committee Note to Rule 804(b)(1). Admissibility under the 804 exceptions rests on the theory that:

> It is better to have the hearsay evidence than no evidence at all. The 804 exceptions bear sufficient reliability to justify their admission when the only other alternative is to lose the declarant's information.

Id., 11 Moore's Federal Practice § 804.02, p. VIII 239. The mandate that necessity be shown is thus critical.

2. *Statement Against Interest—The Requirements of Rule 804(b)(3)*

Rule 804(b)(3) embodies the long-recognized hearsay exception for declarations against interest, and is "based on the guaranty of trustworthiness which accompanies a statement against interest." *United States* v. *Lilley*, 581 F.2d 182, 188 (8th Cir. 1978). In pertinent part, the Rule creates an exception to the hearsay rule, if the declarant is unavailable, for

> a statement which was at the time of its making so far contrary to the declarants' pecuniary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

The rule proposed by the Supreme Court would have broadened the common-law exception by including in its scope statements which tended to make the declarant "an object of hatred, ridicule, or disgrace." Congress deleted this clause of the proposed rule, retaining "the traditional hearsay exception for statements against pecuniary or proprietary interest." House Report, U.S. Code Cong. & Admin.News 1974, p. 7089. However, Congress also retained the provision of the proposed rule relating to civil or criminal liability, which it viewed as a clarification rather than an alteration of the common law rule. *Id.;* Senate Report. On the precise legal issues before us—whether a statement which is against the interest of the declarant's employer falls within the exception, and whether the declarant must be subjectively aware that the statement is against his interest—the legislative history indicates no intention to alter pre-existing law.

Preliminarily, we note that the exception uses the term "statement." Thus it refers back to the definition of "statement" as "assertion," which we discussed at length in Part II-C-2, *supra*. For the same reasons stated there with respect to admissions, we think that a written notation which is not an assertion cannot be a "statement" against the declarant's interest. Accordingly, any of the diary entries or memoranda

which fail to qualify as admissions because they are not assertions will also fail to qualify as statements against interest for the same reason.

To qualify as an exception to the hearsay rule under 804(b)(3), a declaration must be against the employee's interest, not just the employer's interest. Since the trustworthiness of the declaration is insured only by the accompanying threat of loss or liability, the statement must be to the declarant's "immediate prejudice." *Nuttall* v. *Reading Co.*, 235 F.2d 546, 550 (3d Cir. 1956). In *Gilmour* v. *Strescon Industries, Inc., supra*, Judge Broderick, interpreting Rule 804(b)(3) [then Proposed Rule 804(b)(4)] in light of *Nuttall*, held that "a declaration against the interest of the declarant's employer . . . does not fall within this exception to the hearsay rule." 66 F.R.D. at 150. We agree with Judge Broderick's analysis, since the necessary guarantee of trustworthiness is lacking unless the declaration is against the personal interest of the declarant. We note, however, that statements against an employer's interest may be against the employee's own pecuniary or proprietary interests if, for example, they threaten the loss of employment or reduce the chances for future employment. *See Gichner* v. *Antonio Troiano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1969).

Rule 804(b)(3) also requires that the statement be *so far* contrary to the declarant's interests that a "reasonable man in his position would not have made the statement unless he believed it to be true." Plaintiffs contend that the "reasonable man" language establishes an objective test for awareness of the possibility of loss or liability. While this approach is appealing, it is simplistic, for it denies the very rationale of this hearsay exception: that the credibility of self-implication is assured by the declarant's knowledge of the potential consequences. The standard then is objective only to the extent that it is based upon what a "reasonable man" would have said, given a *subjective* understanding of the danger to his interests. The Third Circuit in *Nuttall*, *supra*, held that the fact testified to must be "so palpably against the declarant's interests that

he must have *realized it to be so* when he made the statement." 235 F.2d at 550, quoting 2 Morgan, Basic Problems of Evidence 252 (1954) (emphasis added). Though both *Nuttall* and Morgan antedate the Federal Rules of Evidence, Rule 804(b)(3) does not change the traditional approach requiring consciousness of the implications of the statement against interest. Indeed, a post-F.R.E. case, *Workman* v. *Cleveland—Cliffs Iron Co.*, 68 F.R.D. 562 (N.D.Ohio 1975), has followed the same analysis. A contrary approach would undercut the very rationale of the rule, for as Judge Weinstein has observed:

> It is not the fact that the declaration is against interest but the awareness of the fact by the declarant which gives the statement significance.

Weinstein ¶ 804(b)(3)[02] at 804-98 (quoting Jefferson, "Declarations Against Interest: An Exception to the Hearsay Rule," 58 Harv.L.Rev. 1, 17 (1944).

Since the plaintiffs contend that the declarants' statements were against their interest because they tended to subject the declarants to civil and criminal liability under Japanese law, we must at some point review the pertinent Japanese law and practice. It is convenient to do so here.

Japanese antimonopoly law outlaws price-fixing, furnishes a cause of action against private entrepreneurs for damages, and provides for fines and imprisonment. Section 3 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), as amended, provides:

> Sec. 3 [Prohibition of Private Monopolization and Unreasonable Restraint of Trade]
>
> No entrepreneur shall effect private monopolization or any unreasonable restraint of trade.

Under the Act, an "entrepreneur" is "a person, who carries on a commercial, industrial, financial or any other business." (Section 2(1)). An unreasonable restraint of trade means (Section 2(5)):

> . . . such business activities, by which entrepreneurs by contract, agreement, or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices.

Both civil and criminal remedies are set out by the Act. Section 25 provides for indemnification of the person injured by private monopolization or unreasonable restraint of trade. Criminal liability for employees who violate the Antimonopoly Act is available pursuant to sections 89 and 95. The Act states:

> Sec. 89 [Private monopolization and unreasonable restraint of trade]
>
> (1) Any person committing one of the following offenses shall be punished by penal servitude for not more than three years or by a fine of not more than five million yen [at pertinent times, less than $14,000]:
>
> (i) Any person who, in violation of the provision of Section 3, effects private monopolization or unreasonable restraint of trade.

Section 95 provides for "imprisonment or the imposition of a fine for employees who commit violations of the Act."

While private civil and criminal sanctions exist under the Japanese antimonopoly law, they are rare, and actions against employees are virtually unknown. Plaintiffs' own expert witness, Professor John O. Haley, testified that there have been only "three or four" civil actions brought in the thirty-year history of the Antimonopoly Act. PTO 264 at 305 (June 24, 1980). According to the defendants' unchallenged representations, none of these have ever been brought against individuals, and all were initiated *after* the Six Company Case commenced in 1966. Moreover, according to the defendant's unchallenged representations, only four Antimonopoly Act criminal cases were prosecuted in Japan prior to 1974, all of which involved consumer fraud rather than price-fixing, and the first criminal cases under section 89, the price-fixing sec-

tion, against individuals were the oil company cases initiated in 1974. Defendants' Supplemental Memorandum Concerning the Inadmissibility of the JFTC Materials Under Fed. R. Evid. 801(d) and 804(b)(3) at 18 (July 14, 1980).

We leave until later our conclusions as to the effect of this law and practice upon plaintiffs' claim that statements made by various declarants fall within the ambit of Rule 804(b)(3).

F. *The Residual Hearsay Exceptions: Rules 803(24) and 804(b)(5)*

1. *Introduction*

In addition to proffering the diaries, protocols, and testimony of witnesses before the JFTC under the traditional hearsay exceptions, plaintiffs proffer those documents under the residual exceptions codified in F.R.E. 803(24) and 804(b)(5), which create an exception from the hearsay rule for:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

All 804 exceptions are subject to a general showing of unavailability of the witness as required by subsection (a) of that Rule. Rule 803 has no such condition. The residual exceptions are otherwise identical in language and purpose.[87]

In *United States* v. *Bailey*, 581 F.2d 341, 346-47 (3d Cir. 1978), the court of appeals reviewed the legislative history of these exceptions and observed that "[t]he history . . . indicates

[87] Because the residual exceptions have their own unavailability requirements, the existence of two such identical provisions is rather mysterious. *See* Note, The Theoretical Foundation of the Hearsay Rules, 93 Harv. L. Rev. 1786, 1793, n. 27 (1980).

a congressional intention that the rules have a narrow focus."[88] *Accord*, *deMars* v. *Equitable Life Assurance Society*, 610 F.2d 55, 61 (1st Cir. 1979); *Huff* v. *White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979); *United States* v. *Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979); *United States* v. *Mathis*, 559 F.2d 294, 299 (5th Cir. 1977).

The proposed rules as submitted to Congress included broad residual exceptions. The Advisory Committee explained:

> It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exceptions (24) and its companion provision in [Rule 804(b)(5)] are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. *See Dallas County* v. *Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

The proposed residual exceptions were eliminated by the House Judiciary Committee. The Senate reinstated the exceptions in a modified form, and the Senate version was accepted by the House-Senate Conference Committee.[89] The Senate

[88] The plaintiffs urge that in *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F.Supp. 163, 185 n. 23 (E.D.Pa. 1978), we indicated that the residual exceptions should be liberally construed. We find no such view expressed either directly or by implication in the footnote cited. It is clear from *Bailey*, as well as from the legislative history and decisions in other circuits, cited in text *infra*, that the residual exceptions are to be narrowly construed.

[89] The Conference Committee added a requirement of advance notice to the adverse party when the exceptions are invoked. *See United States v. Oates*, 560 F.2d 45, 72 n. 30 (2d Cir. 1977). The notice requirement is not before us.

Black defines a finding variously as "the result of deliberations of a jury or the court; a decision upon a question of fact reached as the result of a judicial examination or investigation; a determination from the evidence of a case; a conclusion by way of reasonable inference from the evidence." These definitions comport with the common sense meaning of "finding" and support the view that a finding does not include legal conclusions that may have been reached by an investigator[10] and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator and that such factual statements need not be formally termed "findings" in order to come in under 803(8)(C).[11]

This conclusion accords with the case law, which has applied 803(8)(C) to a variety of materials. *See, e.g., Melville* v. *Amer-*

> of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b) bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

Report of the Committee on the Judiciary, S.Rep.No. 93-1277, 93d Cong., 2d Sess. 18 (1974), U.S.Code Cong. & Admin. News 1974, p. 7064.

The Conference Committee did not resolve this difference in interpretation, but as discussed *infra*, it is apparent that the courts have generally taken the more liberal view expressed by both the Advisory Committee and the Senate.

[10] Arguably, neither does the term "findings" encompass investigations stated in documents that are accusatory or prosecutorial in nature, although we conclude *infra* that such matters are more properly considered under the "trustworthiness" proviso of 803(8).

[11] Obviously, 803(8)(C) also encompasses the findings of public offices or agencies of state and foreign governments. *See Weinstein's Evidence*, § 803(8)[01] at 803 190. *Cf. Lloyd* v. *American Export Lines, Inc., supra*, 580 F.2d at 1189.

ican Home Assurance Co., 443 F.Supp. 1064 (E.D.Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3rd Cir. 1978) (admitting Federal Aviation Administrative Airworthiness Directives); *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) (factual findings of hearing examiner in Coast Guard proceeding admissible); *Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) (police report containing findings about color of traffic light at the time of accident admissible); *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979) (reports discussing general circumstances of an airplane crash and conclusions about the cause of the crash admissible); *Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D.Ohio 1979) (related case to *Sage, supra*, admitting report containing conclusion about the cause of the crash, but excluding report discussing general circumstances on the ground that it was prepared by an inexperienced investigator and was therefore not trustworthy); *United States* v. *School Dist. of Ferndale*, 577 F.2d 1339 (6th Cir. 1978) (findings of HEW hearing examiner admissible).

Although it was not entirely clear until the caselaw began to develop, it is now generally accepted (and settled in this circuit) that under the aegis of 803(8)(C) evaluative reports of public agencies (i.e., those rendering normative judgments or opinions, not just reciting facts) are admissible. *See Melville* v. *American Home Assurance Co., supra*, 443 F.Supp. 1064.[12] The caselaw has yet to make clear, however, whether the conclusion that evaluative reports come within the definition of 803(8)(C) findings renders admissible all materials within those reports—even those that do not fall within our definition of "finding," including hearsay materials that are not otherwise admissible. This is a critical question, for as will be seen,

[12] *Melville* has been followed in other jurisdictions. *See Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979).

the staff workups upon which plaintiffs here rely contain, in many instances, multiple hearsay and broad ranging and highly conclusory statements.

Although the fact is not reflected in the published opinion, the record of the *Plywood* litigation, *supra*, shows that Judge Pointer admitted as findings only factual statements and excluded those that contained legal conclusions. Furthermore, he only admitted those findings of the administrative law judge that were approved and adopted in the opinion of the F.T.C.[13] We agree with the approach taken by Judge Pointer. We conclude that so long as the trustworthiness criteria are met (*see* discussion *infra*), where a staff report contains factual averments that are not mere recitations of evidence, but rather reflect conclusions made by the staff on the basis of evidence before it, those averments may be admitted as 803(8)(C) "findings." Where, however, the staff report is submitted to a commission or other public agency charged with making formal findings, only those factual statements from the staff reports that are approved and adopted by the agency will qualify as 803(8)(C) "findings."

Furthermore, we do not believe that the drafters envisioned that 803(8)(C) would result in the admission of all the exhibits and data that might accompany a given staff report. As we see it, the drafters of 803(8)(C) were motivated by a variation on the theme underlying all hearsay exceptions—that circumstantial guarantees of trustworthiness are provided by the presumption that governmental officials will perform their duties faithfully. Accordingly they were agreeable to the receipt into evidence of governmental agency findings. We do not perceive, however, that the drafters intended to piggyback the whole administrative proceeding on top of the trial. To do so would permit vast amounts of time to be spent addressing the admissibility of exhibits which are but excess baggage with no direct bearing on the issues at trial. Such a result would,

[13] We have reviewed extensive portions of the record in *Plywood* and have, by discussion with Judge Pointer, verified the scope of his rulings.

indeed, offend the basic constructional rule, F.R.E. 102, one of whose precepts is the "elimination of unjustifiable expense and delay," as well as the principles underlying Rule 403. *See John McShain, Inc.* v. *Cesena Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977). This point will come clearer as we proceed through our analysis of the evidence.

Conceptually, we believe this result is consistent with the principles of F.R.E. 703, under which an expert's opinion, based in part on inadmissible evidence, is admissible even though the underlying data is not admissible for its truth. We sense a reluctance on the part of the courts to permit the underlying data unless it is independently admissible. *See, e.g., Baker* v. *Elcona Homes, supra*, 588 F.2d at 559 (6th Cir. 1978). *But see Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977), in which Judge Tenney admitted not only the factual findings made pursuant to a prior proceeding of the United States Coast Guard but the exhibits that accompanied the Coast Guard record and report as well. Judge Tenney's decision as to the exhibits consumes but one brief paragraph of his opinion, and we do not feel bound by it. Instead, we adhere to the view that, unless independently admissible, the exhibits do not come along as "excess baggage." We agree, however, with Judge Tenney's decision that transcripts of agency hearings are not admissible under 803(8)(C), but are tested instead under the provisions of Rule 804(b)(1) (Former Testimony).[14]

With these general observations as to the scope of 803(8)(C) findings in mind, we turn to a discussion of the "trustworthiness" proviso of 803(8) under which those findings must be tested.

[14] In this regard, plaintiffs' reliance on *Hackley* v. *Roudebush*, 520 F.2d 108, 156 n. 193 (D.C. Cir. 1975) is misplaced. That case is in accord with our view. It held only that the transcript (as opposed to its substance) could come in under 803(6) or 803(8)(B), subject to objection to the testimony itself grounded upon 804(b)(1) or 801(d)(1) and (2).

B. *The Trustworthiness Proviso*

The text of Rule 803(8)(C), *supra*, and the Advisory Committee note, *see infra*, make plain that broad leeway is accorded to the trial judge to exclude 803(8) material where the sources of information and other circumstances indicate lack of trustworthiness. Because 803(8)(C) is such a potent litigation tool, the parties are prone to skirmish mightily over the trustworthiness *vel non* of public records and reports. The Advisory Committee makes clear that opponents of the evidence have the burden of rebutting the presumption that 803(8)(C) materials are trustworthy and admissible. "[T]he rule . . . assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Advisory Committee Note to Rule 803(8). *See Melville* v. *American Home Assurance Co., supra*, 443 F.Supp. at 1112.

The trustworthiness question is something which, as we see it, must be resolved prior to trial, lest there be lengthy delays in the midst of the trial process (most disconcerting to the jury) while the court adjudicates the matter; accordingly, the *in limine* or pretrial hearing is the appropriate vehicle for such adjudication, which can take the form of admission or exclusion of evidence or redaction thereof. Although Rule 803(8) requires the court to make a threshold determination on the trustworthiness issue, the Rule also clearly implies that where the court determines that the evidence passes that threshold, the party against whom the evidence is offered may counter it by introducing before the jury evidence of the untrustworthiness of the public record or report.[15] However, where the probative value of the report is outweighed by the danger of unfair prejudice, confusion of issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence attendant upon the opponents' efforts to establish untrustworthiness of the report, the court may exclude the report under F.R.E. 403. *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977).

[15] It is expected that the trial judge would, in any event, give a limiting instruction to the jury to the effect that they are not bound by the public agency finding, but rather must consider it as evidence along with all the other evidence.

The Advisory Committee addressed the important question of the criteria to be applied in determining trustworthiness of evaluative reports, listing the following factors for assistance in passing upon admissibility:

> (1) the timeliness of the investigation . . .; (2) the special skill or experience of the official . . .; (3) whether a hearing was held and the level at which conducted . . .; (4) possible motivation problems . . . .

Advisory Committee note to 803(8) (citations omitted). The Committee also observed: "Others no doubt could be added." As we proceeded through our hearings on public records and reports, it became clear to us that this statement was correct, or perhaps prescient.

Consonant with the Advisory Committee's thought, and in aid of disposition of the evidentiary questions before us, we have fashioned a number of additional criteria for evaluating trustworthiness.[16] Each of these criteria has emerged from the crucible of our hearings, and is responsive to what we perceive to be a legitimate concern about the trustworthiness of the reports and findings proffered by plaintiffs. The criteria are responsive to a number of questions about the scope of Rule 803(8)(C) which have not been addressed, or at least extensively developed, in the caselaw. These criteria, which we shall apply in our trustworthiness evaluation, in addition to the Advisory Committee's four criteria, are as follows:

> (1) The finality of the agency findings, *i.e.*, the state of the proceedings at which the findings were made (whether they are subject to subsequent proceedings or *de novo* review), and the likelihood of modification or reversal of the findings.
>
> (2) The extent to which the agency findings are based upon or are the product of proceedings pervaded by re-

[16] Several of these criteria are essentially refinements of the Advisory Committee's criteria.

ceipt of substantial amounts of material which would not be admissible in evidence (*e.g.* hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding.

(3) If the findings are products of hearings, the extent to which appropriate safeguards were used (Administrative Procedure Act, Due Process), and the extent to which the investigation complied with all applicable agency regulations and procedures.

(4) The extent to which there is an ascertainable record on which the findings are based.

(5) The extent to which the findings are a function of an executive, administrative, or legislative policy judgment (as opposed to a factual adjudication) or represent an implementation of policy.

(6) The extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as the result of trustworthiness evaluation.

(7) Where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field.

There was considerable dispute about all of these matters during the course of the hearings. The foregoing formulation represents a conclusion on our part that public records and reports will fail to pass trustworthiness muster under the circumstances suggested in these criteria, which we shall now address briefly. Fuller explication will emerge from an application of these principles to the actual evidence before us.

Addressing our first additional criterion, we believe that where the proffered findings are preliminary, emerging at an early stage of the agency's proceedings,[17] and are not only

[17] We recognize that not all 803(8)(C) material emanates from agency proceedings, *cf. Baker* v. *Elcona Homes*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979), but in most cases it does. Moreover, the *Baker* sort of case, which involved a police investigation report of a motor vehicle collision, is usually much simpler to deal with.

subject to extensive reconsideration, but are highly susceptible to modification or reversal, they cannot be deemed trustworthy. The drafters of the Rule appear not to have contemplated that it might be used to admit administrative decisions which are subject to appeal, for unlike Rule 609(e)[18] nothing in the Rule precludes or qualifies its application when the findings that a party seeks to introduce are subject to extensive review. Given the absence of provision for such a situation by the drafters, we believe the appropriate course is to consider the preliminary finding a candidate for admissibility but to also consider the forthcoming review in determining whether or not the findings are trustworthy.[19] Of course, if administrative findings are reversed, rejected, or overruled on appeal, the rejected findings must be deemed untrustworthy, as we have occasion to discuss in more detail in connection with the CF29's. *See* Saltzburg and Redden, *Federal Rules of Evidence Manual* (2d Ed.Supp. 1980) at 152.

In sum, we think that the effect on admissibility of the fact that a particular finding was made in the "first inning," so to speak, of a protracted process should be considered under the rubric of trustworthiness and not, as the defendants contend, as part of the definition of "findings." The dangers of modification or reversal were demonstrated in the *Plywood* litigation, *supra*, when the decision of the FTC (though not the findings actually introduced) was recently reversed. *See Boise Cascade Corp., et al.*, [1978] Trade Reg. Rep. ¶ 21,393, *enforcement denied, Boise Cascade Corp.* v. *FTC*, [1980-2] Trade Cases ¶ 63,323. We turn to our second, third, and fourth additional criteria, which we shall address together.

The fact that the findings were based in part on hearsay or on confidential sources which were not divulged to the defendants

[18] Rule 609(e) provides: "The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."

[19] The availability or pendency of review should also be a factor which may be presented to the trier of fact to influence the weight given the finding. *Cf.* F.R.E. 609(e).

does not ipso facto render the findings so untrustworthy as to be inadmissible. No court has held that in order to be admissible under 803(8)(C) findings must result from proceedings with *all* the procedural protection afforded under the APA or in judicial proceedings. Such an interpretation would be at odds with the failure of the drafters of 803(8)(C) to require first hand knowledge by the investigator or a duty to report by those contributing information. It would also conflict with the Advisory Committee's "assumption that a public official will perform his duty properly," *i.e.*, will exercise his judgment and give appropriate weight to the various types of evidence relied upon by the government. Moreover, given the fact that most 803(8)(C) reports are in the nature of expert reports, such a construction would be inconsistent with Rule 703, which provides that the facts and data forming the basis for an expert opinion need not themselves be admissible so long as they are of a type reasonably relied upon by experts in the particular field.

We believe, however, that findings cannot be deemed trustworthy where they emerge from proceedings that are pervaded by the receipt of ordinarily inadmissible material or that are notably lacking in procedural safeguards, although appropriate weight must be accorded where the agency has complied with its own procedures. *Cf. Lloyd* v. *American Export Lines*, *supra*, 580 F.2d at 1189 (judgment of Japanese court held admissible under 803(22) where foreign proceedings accorded with "civilized jurisprudence" and were "stated in a clear and formal record").

Thus, when hearsay dominates, the report may be excluded. *See Swietlowich* v. *County of Bucks*, 610 F.2d 1157, 1165 (3rd Cir. 1979) (district attorney's report proffered in civil rights litigation excluded because based on hearsay); *John McShain, Inc.* v. *Cessna Aircraft Co.*, *supra* (National Transportation Safety Board report based upon hearsay statement excluded); and see *Melville, supra*, where one FAA airworthiness directive which rested on hearsay was excluded. 443 F.Supp. at 1115, n. 75. *But see* n. 21 *infra*.

The fifth additional criterion we have set forth—the extent to which the findings are a function of an executive, administrative, or legislative policy judgment or represent an implementation of policy—is essentially a variation on the theme of "motivational problems" identified as one of the Advisory Committee's trustworthiness criteria, although we think it different enough to warrant separate discussion. In our view, where there exists within an agency a preconceived notion of the policy that the agency is attempting to implement, *e.g.*, sheltering United States industry from what are perceived as the deleterious effects of unfettered international competition, *see* Part IV *infra*, the "findings" of that agency are to at least some degree a function of that preconceived notion, and though they may be "trustworthy" in light of the particular policy objectives the agency is attempting to further, they may or may not be trustworthy for other purposes. Overriding policy concerns bring into question the objectivity of an agency's findings just as the objectivity of a report prepared in anticipation of litigation, *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), may be questionable.

The final criterion upon which we need comment at any length is the last additional criterion we have listed—where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are ascertainable and/or are of a type reasonably relied upon by experts in the particular field.[20] That criterion is a function of the close relationship between 803(8)(C) and F.R.E. Article VII (the opinion evidence rules), which we discussed in our opinion in *Melville*, 443 F.Supp. at 1114-15, and of which the court of appeals likewise took cognizance. 584 F.2d at 1316. As we have suggested above, 803(8)(C) evaluative findings are

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[20] We have not independently discussed additional criterion #5. The reason this criterion bears upon the question of trustworthiness is self-evident. Where a finding merely reiterates or depends in significant measure upon a finding made by another investigatory body, its trustworthiness is a function of the trustworthiness of the procedures used by the agency that made the finding initially.

frequently offered for their underlying (or overriding) expertise; hence, implicit in the trustworthiness determination is the right to attack: (1) the agency's expertise, *see* Advisory Committee Note ("the special skill or experience of the official"); (2) the basis of its opinion or finding, and (34) its helpfulness to the jury (F.R.E. 702). Just as an opinion may be held inadmissible if its basis is sufficiently tainted, so may a public record or report which is in effect an opinion.[21]

We have considered plaintiffs' argument that 803(8) and the opinion evidence rules differ in that the latter require a foundation to be laid prior to the introduction of the expert's testimony whereas 803(8) omits the foundation requirements. This argument is answered in *Melville, supra,* 443 F.Supp. at 1115—in the case of public records and reports, the foundation can be attacked under the trustworthiness rubric. "[W]here the foundation of an opinion would be discredited under Rule 705 cross-examination, the presumptive trustworthiness of the opinion might well be sufficiently impugned to disqualify the report under 803(8)(C), thus requiring the proponent of the report either to produce the declarant for purposes of cross-examination or to forego use of the evidence."

We have also considered, and concur with, plaintiffs' contentions that there is no requirement in the F.R.E. that evidence be dispositive of a particular factual issue to be admissible. Where a public record or report passes the trustworthiness threshold, its weight is for the jury, subject to evidence and

[21] *Cf. Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D.Ohio) (1979), where Judge Rubin permitted introduction of a Naval Rework Facility report containing conclusions about the causes of an airplane crash. Even though the report was based exclusively on hearsay, it was held admissible because the hearsay was provided by persons with firsthand knowledge and the report was prepared by an experienced investigator. Judge Rubin excluded a second report that discussed general circumstances surrounding the crash because it was prepared by an inexperienced investigator. In a related case, *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979), Judge Loughlin permitted introduction of both reports, ruling that the experience or inexperience of the investigator preparing the report was a factor that went to weight and not admissibility.

argument by the opposing party that the report is not trustworthy (and also subject to the overriding requirement that if the probative value of the report is outweighed by the delay involved in litigating trustworthiness, it may be excluded under F.R.E. 403. *John McShain, Inc.* v. *Cessna Aircraft Co., supra*). However, the court's obligation to make the threshold determination, at an *in limine* hearing, remains. This determination, as we see it, must come from a balancing process wherein all of the relevant factors are evaluated. Where the public report is in the nature of an expert opinion, those factors include a consideration of whether the agency possesses sufficient expertise, *see* n. 21, *supra*, whether the factual basis of the report is flawed, and whether the facts or data upon which the opinion is based are ascertainable and/or are of a type reasonably relied upon by experts in the field.

Against this background, we turn to consideration of the 1921 Antidumping Act material.

III. The 1921 Antidumping Act Material

A. *Introduction*

The plaintiffs have submitted for consideration seven documents arising out of proceedings instituted by the Treasury Department under the 1921 Antidumping Act, 19 U.S.C. § 160, *et seq.* (repealed 1980). We have sketched the procedure under the 1921 Act in our opinion filed on April 14, 1980, 494 F.Supp. 1190, dismissing the greater part of plaintiffs' claims under the Antidumping Act of 1916. The chronology of the proceeding may be gleaned from a description of the documents before us, listed by their DSS numbers:

1. The Antidumping Proceeding Notice, 33 FR 8851 (1968);

2. The Withholding of Appraisement Notice, 35 FR 14100 (1970);

3. The Treasury Department Determination of Sales at Less Than Fair Value, 35 FR 18549 (1970);

4. Determination of Injury, United States Tariff Commission Investigation No. AA1921-66 (undated);

5. Notice of Dumping Duty to Be Imposed, 36 FR 4576 (1971) [consists of DSS #4 with introductory text];

5A. The Treasury Department Finding of Dumping, 36 FR 4597 (1971); and

6. Numerous Customs Form 29's (various dates in 1978) [appraising dumping duties against various defendants and other importers].[22]

The defendants' objections to the 1921 Act submissions are manifold and we shall take them up in detail as we discuss each document. Suffice it to say by way of introduction that defendants' overriding arguments fall into the following categories:

1. The documents do not constitute findings within the meaning of § 803(8)(C).

2. The documents are not trustworthy.

3. The documents are not relevant.

4. Any minimal probative value the documents may have is outweighed by the factors listed in Rule 403.

It would take chapters, not pages or paragraphs, to describe the labyrinthine procedures under the 1921 Antidumping Act. Those proceedings, to paraphrase the old movie title, are a many-layered thing. Moreover, although the proceedings with which we are now concerned have been going on for years, they are nowhere close to resolution. On a fair estimate, it might take another decade before they are resolved, that is if the settlement recently entered into between the Treasury Department and the respondents in that proceeding is overturned in court.[23] We will not describe the entire procedure here; it is amply developed in the record. However, we will sketch the major events in the twelve-year history of the proceeding as a necessary background to our consideration of the defendants' evidentiary objections.[24]

[22] The record contains thousands of CF29's. However, as we have noted, *supra*, they all raise the same issues and can be disposed of together.

[23] *See* pp. 1153-1154, *infra*.

[24] The following account of the proceedings under the 1921 Act is taken from the public record consisting of the notices published in the Federal Register, i.e. DSS # # 1-5A themselves; from papers filed by the government in *Committee to Preserve American Color Television* v. *Miller*, No. 79 1948 (D.C.Cir.), copies of which have been made available to us by the defendants; and from the affidavits submitted by the defendants. Those affidavits were signed and sworn by A. Paul Victor, who is counsel of record for the Matsushita defendants in this action and also represented Matsushita in the 1921 Act proceedings, and by Lawrence R. Walders, who is counsel of record for the Hitachi defendants in this action and represented Hitachi and others in the 1921 Act proceedings. The plaintiffs have not controverted any of the material averments of the Victor and Walders affidavits, except to point out that judicial review of the LTFV and injury findings are not equivalent to a trial *de novo*, *see* n. 26, *infra*.

B. *The 1921 Act Proceedings*

An administrative proceeding under the 1921 Antidumping Act could be initiated by the Customs Service *sua sponte* or by any person who had information that merchandise was or was likely to be imported into the United States under circumstances bringing it under the purview of the Act, and who communicates that information in writing to the Commissioner of Customs. The Japanese television proceeding was intiated by the receipt of information from the law firm of Lincoln & Stewart on behalf of the Imports Committee of the Tube Division of the (United States) Electronic Industries Association. In accordance with applicable customs regulations, the Commissioner of Customs then undertook a summary investigation to determine whether or not the information was "patently in error" or whether for other reasons further investigation was not warranted. Following that summary investigation, the Commission published in the Federal Register an "Antidumping Proceeding Notice," as was required by the regulations whenever a proceeding was not discontinued after the summary investigation. That notice constitutes DSS #1. The notice stated, in principal part, that information had been received in proper form which tended to indicate that television receivers from Japan were being sold at less than fair value, within the meaning of the Act, and that the Customs Bureau was "instituting an inquiry . . . to determine the validity of the information." 33 Fed.Reg. 8851 (June 18, 1968).

In the course of that inquiry, Treasury officials investigated the prices during the six-month period from November, 1967 to May, 1968 of five Japanese companies: Matsushita, Hitachi, Toshiba, Sharp, and Sony. The "less than fair value" ("LTFV") investigation lasted for two and one-half years, during which time Customs officials sought to determine the "purchase price," the "exporter's sales price," and the "home market price," as defined in the 1921 Act and in regulations promulgated thereunder. The determination whether or not LTFV sales had been made depended upon whether the "purchase price" or "exporter's sales price," representing prices in the United States, were lower than "home market price," representing prices in Japan. The three types of prices on which the determination was based were not actual transactional prices, but were constructs derived by applying to actual transactional prices a variety of adjustments reflecting, for instance, freight charges, selling expenses, or differences in the circumstances of sale. The LTFV proceedings consisted primarily of the verification of transactional price data submitted by the five Japanese manufacturers, and of decisions, made informally by anonymous Treasury officials after *ex parte* contacts with representatives of United States and Japanese manufacturers, to allow or disallow adjustments claimed by the Japanese manufacturers.[25]

After the Antidumping Proceeding Notice, the next step in the formal 1921 Act procedures, as set forth in Treasury Regulations, was the publication of a "Withholding of

[25] According to the Walders affidavit, *see* n. 24, *supra*, the adjustments claimed by Hitachi and other companies for differences in the circumstances of sale of television receivers in the U.S. and in Japan would have eliminated the apparent margin of dumping if the adjustments had been granted instead of disallowed. Hitachi claimed adjustments to reflect, for example, cash discounts to retailers in Japan, costs of sales promotion in the Japanese market, and interest costs incurred in Japan. Hitachi was notified in informal conferences with Treasury officials that each of these claimed adjustments were disallowed, in whole or in part, but no written statement of the reasons for the disallowance was ever made, and Hitachi continues to maintain that the claimed adjustments should have been granted.

Appraisement Notice" if the Commissioner of Customs determined that there were "reasonable grounds to believe or suspect" that LTFV sales had been made. In conjunction with that notice, customs officials were directed to withhold their appraisement of imported merchandise of the specified type. The Withholding of Appraisement Notice in the Japanese television proceeding was published in the Federal Register on September 4, 1970, 35 Fed. Reg. 14100, and is DSS #2 in the litigation now before us.

Following the publication of that notice, the Treasury Department held an informal hearing on October 14, 1970, to permit interested persons to make oral presentations of their views. No testimony was taken at that hearing, and no record was made; indeed, the participants were forbidden to make a transcript of the hearing by electronic or other means. The ultimate decisionmaker in the LTFV phase of the proceedings, Assistant Secretary of the Treasury Euguene T. Rossides, did not attend the hearing.

On December 5, 1970, the final result of the LTFV inquiry was published in the Federal Register, 35 Fed.Reg. 18549. This "Determination of Sales at Less Than Fair Value" is now offered as DSS #3. In it, Assistant Secretary Rossides found that television receivers from Japan were being sold at less than fair value, within the meaning of the 1921 Act. The determination, which occupies little more than one column on one page of the Federal Register, was based on a comparison of either the "purchase price" or the "exporter's sales price" with the "home market price." Although the LTFV finding did not state the magnitude of the margin between United States and Japanese prices, subsequent statements of customs officials, which are in the record before us, put the LTFV margin at 2.2%. The determination listed, in a conclusory fashion, the types of adjustments which had been made to arrive at each of the price constructs, but offered no statement of the reasons why particular adjustments were made, the amounts of the adjustments, the models and categories of television receivers with respect to which each adjustment was made, or the manu-

facturer with respect to whose prices the adjustments were made. The determination made no mention whatever of the adjustments claimed by the manufacturers which Treasury officials had disallowed and, in particular, gave no statement of the reasons for disallowance of such claimed adjustments.

Following the LTFV determination, the 1921 Act proceeding was referred to the United States Tariff Commission in accordance with 19 U.S.C. § 160(a) for an investigation as to whether an industry in the United States was being injured by reason of LTFV sales of television receivers from Japan. An evidentiary hearing was held before the Tariff Commission, which issued its "Determination of Injury" on March 4, 1971. The Commission considered confidential submissions from American manufacturers which were not divulged to counsel for the importers. At the evidentiary hearing, counsel for the importers were not permitted to cross-examine witnesses with respect to confidential data to which those witnesses referred during direct testimony.

The Tariff Commission found that an industry in the United States was being injured by reason of the importation of television receivers from Japan which were being sold at LTFV prices. It found the injured industry to consist of "the facilities in the United States for the production of television receivers," and noted that there were approximately 20 firms in the industry. The Commission's report did not mention any firm individually, but discussed only injury to the industry as a whole. A typescript of the report is offered in this litigation as DSS #4, and the nearly identical version published in the Federal Register is offered as DSS #5, 36 Fed.Reg. 4576.

According to the statutory scheme of the 1921 Act, after a finding of LTFV sales by the Treasury Department and a finding of injury by the Tariff Commission have both been made, the Secretary of the Treasury was required to publish a finding of dumping. 19 U.S.C. § 160(a). The publication of a dumping finding was a purely ministerial act since it was an automatic consequence of the LTFV and injury findings. *See Timken Co.* v. *Simon*, 539 F.2d 221 (D.C.Cir. 1976). In the

Japanese television proceeding, a "Finding of Dumping" was published on March 10, 1971, 36 Fed.Reg. 4597. This finding, which is proffered as DSS #5A, consists of a brief report of the LTFV and injury determinations, and an announcement of the formal finding of dumping with respect to television receivers imported from Japan.

Following the issuance of the dumping finding, the Customs Service commenced the process of liquidating the dumping duties owed by each importer of Japanese television receivers. By statute, the duty equalled the difference between the purchase price or exporter's sales price and the foreign market price. 19 U.S.C. § 161(a). During the liquidation process, the Customs Service addressed for the first time the responsibility of particular importers for sales in the United States at lower prices than those charged for comparable merchandise in Japan. The liquidation of duties proceeded extremely slowly. Until March 31, 1978, seven years after the dumping finding and ten years after the initiation of the proceeding, no duties had been assessed against any importers. The Customs Service had undertaken the laborious task of requiring and then reviewing voluminous submissions from each importer of Japanese television receivers, concerning transactional prices and claimed adjustments. However, early in 1978, the Customs Service decided to accelerate the assessment of duties by discarding the traditional method of determining foreign market price, relying instead on calculations based on the commodity tax levied upon Japanese manufacturers by the Japanese government. This so-called "Japanese commodity tax formula" consisted of multiplying the retail price in Japan by a fixed factor of .5391 to determine a projected ex-factory wholesale price. No adjustments were made to the figure derived by application of the "Japanese commodity tax formula," although the statute and regulations promulgated thereunder required that many types of adjustments be made in the determination of foreign market price.

Beginning on March 31, 1978, the Customs Service assessed dumping duties based upon the unadjusted foreign market

value calculated by means of the commodity tax formula. The initial assessment, covering imports made through June 30, 1973, totalled approximately $46 million. The Customs Service estimated that the total amount of dumping duties assessed on the basis of the unadjusted commodity tax formula would be approximately $500 million. The customs forms notifying importers of the assessment of duties on the basis of the Japanese commodity tax formula, known as CF29's, are proffered in this litigation as DSS #6. There are literally thousands of CF29's in the record, as a separate form was prepared for each entry of merchandise into the United States during the relevant period.

The duties assessed in 1978 were subject to administrative review as a result of protests filed by the importers. The protest decisions addressed a variety of objections, but primarily consisted of decisions to allow or disallow certain claimed adjustments to the commodity tax formula. As a result of adjustments made by the protest decisions, the $46 million assessed for dumping duties through June 30, 1973 was reduced by more than 80% to less than $8 million.

On January 1, 1980, the responsibility for the administration of antidumping proceedings was shifted from the Treasury Department to the Commerce Department, pursuant to Executive Order No. 12188 and Reorganization Plan No. 3 of 1979. After a review of the Japanese television proceeding, Homer E. Moyer, Jr., General Counsel of the Commerce Department, recommended to the Secretary of Commerce that the proceeding be settled by a compromise of the government claims. The claims were settled on April 28, 1980, for payments of $77 million in return for a release of any liability for antidumping duties resulting from imports made before April 1, 1979. The operation of the settlement agreements has been stayed, however, by order of the United States Court of Appeals for the District of Columbia in litigation brought by an organization which represents the interests of domestic television producers. *Committee to Preserve American Color Television* v. *Miller*, No. 79-1948. Moreover, Zenith has brought

an action in the United States Customs Court to challenge the determinations reflected in the settlement.

If the settlement agreements are invalidated for any reason, or if the proceeding had never been settled, the importers against whom dumping duties had been assessed would have a right to seek judicial review of the proceeding the the United States Customs Court. In fact, Matsushita sought to raise due process objections to the LTFV investigation in the Customs Court in 1971, but its suit was dismissed as premature, since challenges to the LTFV finding could be heard after the liquidation of duties. *Matsushita Electric Industrial Co.* v. *U.S. Treasury Department*, 67 Cust.Ct. 328, 333, C.D. 4292 (1971), *aff'd*, 485 F.2d 1402, 60 C.C.P.A. 85, *cert. denied*, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973). Thus, the scope of review in the Customs Court could potentially include such matters as procedural objections to the LTFV proceedings which were completed in 1970.[26] Any decision of the Customs Court might be appealed to the Court of Customs and Patent Appeals and, if certiorari were granted, to the Supreme Court.

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[26] The plaintiffs contend that the LTFV and injury findings would not be triable *de novo* in the Customs Court, but would be subjected to a lesser standard of review. The leading decisions of the Court of Customs and Patent Appeals have held at least that those findings must be upheld if they are supported by substantial evidence, and also contain strong indications that the standard of judicial review is even narrower, amounting to an "arbitrariness" standard. *Imbert Imports* v. *United States*, 475 F.2d 1189, 60 C.C.P.A. 123 (1973); *City Lumber Co.* v. *United States*, 457 F.2d 991, 59 C.C.P.A. 89 (C.C.P.A. 1972); *Kleberg & Co.* v. *United States*, 71 F.2d 332 (C.C.P.A. 1933). Some recent decisions of the Customs Court have applied this narrow standard of review. *E.g.*, *Armstrong Bros. Tool Co.* v. *United States*, C.D. 4838 (Cust.Ct. Jan. 28, 1980), *appeal pending*, No. 80-20 (C.C.P.A.); *SCM Corp.* v. *United States*, C.R.D. 80-2 (Cust.Ct. Mar. 7, 1980). However, in *Michelin Tire Corp.* v. *United States*, C.R.D. 79-6 (Cust.Ct. Feb. 26, 1979), Judge Watson of the Customs Court ruled that the line of appellate decisions commencing with *Kleberg* was no longer valid because of intervening developments in the law, and stated in dictum that a *de novo* trial should be available in actions challenging LTFV and injury determinations under the 1921 Act. In its report on the Trade Agreements Act of 1979, which enacted a new antidumping law, the Senate Finance

Committee commented that the law concerning the scope of review of antidumping findings under the 1921 Act, particularly the availability of *de novo* review, was "unclear and conflicting." S.Rep. No. 96-249, 96th Cong., 1st Sess. at 251 (1979), 1979 U.S. Code Cong. & Admin. News p. 381. The Committee added that antidumping findings under the 1979 Act would not be subject to *de novo* review because procedural changes made by the 1979 Act "have eliminated any need for *de novo* review." *Id.* at 251-52, 1979 U.S.Code Cong. & Admin. News p. 637.

We need not determine whether the antidumping findings proffered here are subject to *de novo* review, to review on a substantial evidence standard, or only to review to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Even the narrowest of the standards of review which have been applied to antidumping findings requires the Customs Court to "engage in a 'searching and careful' inquiry into the facts." *SCM Corp., supra, quoting Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The pertinent fact is that the findings are still subject to judicial review which is more than cursory, however the standard of review is articulated.

Moreover, in *SCM Corp.*, the Customs Court ordered the International Trade Commission to provide a fuller statement of its subordinate factual findings and the reasons for its finding of non-injury under the 1921 Act, in order to make meaningful judicial review possible. We think that the LTFV finding lacks a sufficient statement of reasons and subordinate factual findings, and this deficiency is a significant factor which has contributed to our decision that the finding is untrustworthy. If the LTFV finding were reviewed by the Customs Court, that court might agree with us that the statement of reasons is deficient, and follow *SCM Corp.* by ordering what is in effect a remand of the entire LTFV investigation to the administering agency.

Whatever the scope of review of the findings may be, there is a separate issue as to whether the defendants' objections to the procedures employed in the LTFV investigation are cognizable in the Customs Court. While we are aware of no customs decision which specifically addresses this question, or indicates what degree of deference should be afforded to agency procedures, the reasoning of the *Matsushita* decision, cited in the text, suggests that such procedural objections could appropriately be considered in the Customs Court after the liquidation of duties.

The plaintiffs concede that appraisements of particular entries of merchandise, including the value determinations which underlie the assessment of antidumping duties in the CF 29's, are subject to a *de novo* trial in the Customs Court. *See F. W. Myers & Co.* v. *United States*, 376 F.Supp. 860 (Cust.Ct. 1974).

C. *The Hearsay Objection—Are the Exceptions Satisfied?*

1. *Introduction*

The seven documents that plaintiffs offer from the 1921 Act proceedings are plainly hearsay and, accordingly, are not admissible in evidence unless they fall within one of the hearsay exceptions. The only exception which appears to be relevant is Rule 803(8)(C). The defendants contend that the documents do not fall within the exception because they are not findings, and because they are not trustworthy.

We turn first to the objection that the documents, or at least some of them, are not findings. DSS #s 1 and 2 may be disposed of quickly; they are mere preliminary notices and not findings. Although they may properly be termed reports setting forth the activities of the Customs Service and/or matters observed pursuant to a duty imposed by law and are therefore admissible under the exceptions of Rule 803(8)(A) and (B), their admissibility as substantive proof of dumping violations is perforce conditioned upon the admissibility of DSS #s 3 to 6. DSS#s 3 through 6 may be fairly characterized as "findings," in the ordinary-language sense. The question nonetheless arises as to whether they are findings within the meaning of 803(8)(C), because they are subject to extensive administrative and judicial review.[27] As we have explained in Part II, *supra*, we think that the effect on admissibility of the fact that a particular finding was made in the "first inning," so to speak, of a protracted process should generally be considered under the rubric of trustworthiness and not, as the defendants contend, as part of the definition of "findings."

We turn then to the trustworthiness issues raised with respect to each document.

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[27] DSS # 5A is also assailed as a "non-finding" since its publication, as we have noted, is an automatic consequence of the LTFV and injury findings. We view DSS # 5A as a combined report of the results of the LTFV and injury investigations and its ministerial nature therefore does not affect its status as a "finding." Its trustworthiness and relevance can be no greater, of course, than that of the LTFV and injury findings upon which it rests.

2. *The LTFV Findings*

The question of the trustworthiness of the LTFV findings is not free from difficulty. Three of the four factors identified in the Advisory Committee Note do not militate against their admission. The investigation was timely; the investigating officials were professionally responsible for investigations of this sort,[28] and there is no hint of any motivation problems underlying the investigation.[29] However, the answer to the question of whether hearings were held and at what level is unclear. It is plain that no evidentiary hearing was held, although the parties involved had an informal opportunity to be "heard" by conferring *ex parte* with the investigators to tell their side of the story and respond to questions. There also was an opportunity for the lawyers to argue to the investigators at a sort of "hearing." Yet, the ultimate decision-maker, the Assistant Secretary of the Treasury, Mr. Rossides, was not present at any of the hearings and apparently made the ultimate LTFV finding on the basis of staff reports which may have been oral and therefore unrecorded.

Furthermore, significant problems arise from application of the additional criteria that we have posited. First, while the investigation apparently complied with the Treasury Department's applicable regulations and procedures, the finding is undeniably the product of proceedings pervaded by receipt of substantial amounts of material which would not be admissible in evidence: hearsay, confidential communications, and *ex parte* evidence. Second, there appear to have been few if any safeguards, like the opportunity to cross-examine witnesses, attendant to the investigative and "hearing" process. Third,

[28] There is nothing in the record to indicate the personal or professional qualifications of the officials who were responsible for the LTFV Investigation.

[29] While the defendants remind us that the proceedings were not antitrust-oriented, the motivation problems contemplated by the Advisory Committee Note are not of the nature which defendants suggest. *See id.*, citing *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). *But see* additional criterion # 5 and discussion *supra* at 1147.

there is no ascertainable record on which the finding is based. Fourth, the LTFV finding was made at the nascent stage of the investigation, many years before the actual assessment of duties on particular entries of merchandise. Fifth, the finding would still be subject to searching judicial review, probably, though not certainly, on a narrow standard of review, *see* n. 26, *supra*, were it not for the recent settlement of the government's claims.[30] Finally, the LTFV finding contains no statement of the reasons for allowance or disallowance of particular adjustments, a matter which was crucial to the outcome of the LTFV investigation, and no formal statement of these reasons was ever given.

It is of some significance that both Congress and the Treasury Department have made substantial changes in the pro-

[30] The defendants contend that the LTFV finding has already been decisively repudiated by responsible officials of the Commerce Department in connection with the settlement of the Government claims. While we accept the defendant's parallel argument with respect to the CF29's, we do not find an equivalent repudiation of the LTFV finding in the documents upon which the defendants rely. While Homer Moyer, the General Counsel of the Commerce Department, has in our view conceded that the CF29's would probably be overturned upon judicial review because of use of the commodity tax formula, *see* pp. 1157-1158, *infra*, that formula played no part in the LTFV investigation. Although Mr. Moyer expressed some concern about other aspects of the proceedings in his memorandum recommending settlement of the government's claims, those references were merely assessments of litigation risks of the sort that any attorney would undertake in considering settlement of a case. Thus, we do not view any aspect of the proceeding, except the CF29's, which rested on commodity tax formula, as repudiated by the government.

In addition, the defendants contend that a provision of the settlement agreement itself constitutes an official repudiation of the entire 1921 Act proceeding. In one paragraph which appears to have been included in the settlement agreements negotiated with each importer, the government represents that it "knows of no violation" of the antidumping law. While it is common in settlement agreements to recite that the settlement does not constitute an admission of liability, this statement is extraordinary, going far beyond the "boiler plate" practice. However, we do not believe that we can accord the statement or the settlement agreements any effect so long as they are subject to the stay entered by the D.C. Circuit, *see* p. 1153, *supra*.

cedures employed in administrative proceedings under the 1921 Act and its successor legislation in the years since the LTFV investigation of Japanese television receivers in 1968-70. The current procedures not only rectify the long delays under the previous procedures, but also require that an evidentiary hearing be held in all LTFV investigations and permit interested parties to have access to confidential submissions made to the administering authority, under the protection of a confidentiality order limiting public access to the submissions.[31]

[31] The procedures employed in antidumping proceedings have been changed since 1970 to eliminate any questionable and delay causing practices. The first change was an amendment to Treasury regulations, 37 Fed.Reg. 26299 (1972) which imposed a nine-month deadline for LTFV investigations, with an extension to twelve-month deadline in complicated cases. In 1974, Congress incorporated those time limits into the 1921 Act itself, as amended in the Trade Act of 1974, Pub.L.No. 93-618. *See* 19 U.S.C. § 160(b). In the same act, Congress added a new provision to the 1921 Act which required both the Secretary of the Treasury and of the Tariff Commission to publish a "complete statement" of their findings and conclusions and the reasons or bases therefor on all of the material issues of fact or law presented. 19 U.S.C. § 160(d)(2). The Act also, for the first time, imposed a statutory requirement that hearings be conducted by both the Treasury Department and the Commission. In contrast to the absence of a hearing record in the television case, the Trade Act required the Treasury Department as well as the Commission to make a transcript of all hearings conducted. The statute continued to provide for non-disclosure of confidential information. 19 U.S.C. § 160(d)(3). These statutory changes were implemented by the Treasury Department in regulations issued on June 25, 1976, 41 Fed.Reg. 26203. The provisions for hearings are set forth in Section 153.40 of the regulations, 41 Fed. Reg. 26212.

On March 23, 1978, the Customs Service issued a new regulation providing for disclosure conferences wherein customs officials would advise interested parties of the reasons for tentative determinations. 43 Fed.Reg. 11982. The disclosure conferences which were held after publication of tentative LTFV determinations gave interested parties an opportunity to learn the bases for the calculations. This information helped the parties make a meaningful presentation to the Treasury Department in briefs and oral argument, unlike the situation in the television case where the participants at the LTFV "hearing" had no clear idea of the rationale for the decision, according to the uncontroverted affidavits before us.

The law and procedures for the conduct of antidumping investigations were further revised in the Trade Agreements Act of 1979, P.L. 96 39. That statute repealed the Antidumping Act, 1921, and adopted new antidumping provisions, 19 U.S.C. §§ 1673-1673i (1980). While the Trade Agreements Act largely retained the substantive law of the 1921 Act, it made significant changes in the procedures for the conduct of investigations. Of particular interest are the provisions for access to confidential information that is submitted to the International Trade Commission (the successor to the Tariff Commission) and the Commerce Department (which was given jurisdiction over LTFV investigations). The statute provides for the disclosure under protective order of confidential information which is submitted in confidence to the Commission or the administering authority (the Commerce Department) during the course of an investigation. 19 U.S.C. § 1677f(c). Detailed provisions for disclosure under protective order are set forth in Section 353.30 of the new Commerce Department regulations, 45 Fed.Reg. 8182, 9197 (February 6, 1980), and Section 207.7 of the ITC regulations, 44 Fed. Reg. 76458, 76461-2 (December 26, 1979).

For the reasons indicated in Part II, *supra*, we must engage in a balancing procedure, a qualitative analysis of the factors involved in the trustworthiness balance. On balance, we find the defendants to have met the burden of showing the LTFV findings to be untrustworthy. We have commented upon the timeliness of the investigation, the professional responsibility of the investigating officials for this type of matter, the lack of motivation problems, and the apparent compliance with agency rules in force at the time. However, we believe that the weight of the six factors mentioned in the preceding paragraphs is so strong as to outweigh the others. We turn to the trustworthiness of the injury finding.

3. *The Injury Finding*

The defendants' principal objections to the trustworthiness of the injury finding are that it is based on the LTFV finding, and that the Tariff Commission considered confidential sources of evidence, including a confidential submission from the Treasury Department as well as from domestic manufacturers, upon which the defendants were not allowed to cross-examine witnesses at the evidentiary hearing. As our previous discussion suggests, the consideration of confidential sources of evidence does not in and of itself render the Commission's

findings inadmissible. We need not proceed through the balancing process which would be necessary to assess the reasonableness of the Commission's procedures, however, for the Commission's finding of injury "by reason of" LTFV sales logically depends upon the foundation of the LTFV finding and assumes the latter's validity. Accordingly, the injury finding can be no more trustworthy than the LTFV finding upon which it is based.

4. *The Dumping Finding*

The Finding of Dumping, DSS # 5A, is a composite report of the LTFV and injury findings. As such, it is no more or less trustworthy than the two underlying findings. Because, for the reasons we have already articulated, the LTFV finding is not trustworthy, the dumping finding is not either, and cannot be admitted.

5. *The CF29's*

The CF29's, DSS #6, present different issues of trustworthiness. We need not consider any objections to the procedures used to arrive at the CF29's, since they are untrustworthy for a more compelling reason: they have been overturned by subsequent administrative protest decisions, and have been repudiated by high officials of the responsible agency.

The CF29's that plaintiffs offer are those issued *prior* to administrative protest decisions that reduced the total amount of duties assessed for the relevant period from $46 million to $8 million, i.e., by more than 80 percent. Even the post-protest decision assessments were based on the "commodity tax formula," which has been effectively repudiated by responsible officials. Homer E. Moyer, Jr., the General Counsel of the Commerce Department, made that repudiation clear in his memorandum to the Secretary of Commerce dated April 28, 1980, in which he formally recommended settlement of the government's claims. Moyer wrote:

"Although we could defend use of the Commodity tax formula (a considerable amount of work has gone into memoranda arguing that it is lawful), its legal defensibility is, in my judgment, questionable. The Justice Department, which would of course represent the department in any litigation, is of the view that we could sustain the Commodity Tax formula only if we are able to demonstrate that the prices derived from that formula are *identical* to actual sales prices in Japan. It is almost certain that we could not make such a showing.

"If a court were to hold that the Commodity Tax approach could not be employed under the Antidumping Act, the Government's claims for dumping duties would either have to be dropped or recalculated on the traditional basis." Exhibit B to Reply Memorandum of Matsushita Defendants at 6 (emphasis in original).

This statement goes far beyond an assessment of litigation risks and amounts to an admission that the commodity tax formula, and the assessments based thereon, would probably be found invalid on judicial review. Thus, we conclude that the CF29's are untrustworthy and are inadmissible under Rule 803(8)(C).

We turn now to the question of the relevancy of the LTFV, injury, and dumping findings. We need not consider the relevancy of the CF29's since they have been repudiated by the responsible officials as palpably inaccurate.

D. *The Relevancy Objections*

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. "Evidence which is not relevant is not admissible." Rule 402. Although the standard of relevance is a liberal one, we conclude that is not met here. We consider the relevance of DSS #s 3 through 5A in turn.

1. *The LTFV Finding*

The LTFV finding is irrelevant in this litigation for at least two reasons. First, the finding was a comparison of price constructs and not of actual transactional prices. Second, the finding is countrywide, and does not specify that any particular company sold in the United States at LTFV prices.

The basis for the LTFV finding was a comparison between "purchase price or exporter's sales price and adjusted home market price," 35 Fed.Reg. 18549, as defined in the Antidumping Act of 1921, and as calculated with deductions enumerated in the notice. *Id.* As we have noted, the basis was not a comparison of actual transaction prices in the United States or in Japan.

"Purchase price," defined in 19 U.S.C. § 162 "was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing and *other charges* [unspecified] as applicable. The applicable Japanese commodity tax was added to this price." 35 Fed.Reg. 18549 (emphasis added).

"Exporter's sales price," defined in 19 U.S.C. § 163 "was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insurance, U.S. duty, brokerage charges, U.S. freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise." 35 Fed.Reg. 18549.

"Home market price" was defined in customs regulations as "the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. §§ 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. § 170a(3)) is sold for consumption in the country of exportation on or about the date of

purchase or agreement to purchase of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies." 19 C.F.R. § 53.3 (1970). In the Japanese television proceeding, home market price "was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price, adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustments were also made for differences in the merchandise and differences in advertising and credit costs." 35 Fed.Reg. 18549.

The Treasury Department's conclusion that LTFV sales had been made was merely the legal consequence of its finding that "Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales." 35 Fed.Reg. 18549. Because of all the adjustments in unspecified dollar amounts which were made to the three types of prices considered in the LTFV proceeding, that finding is of no probative weight to support any conclusion about price differentials, either between actual transactional prices or between "adjusted" prices. Thus the finding has no tendency to make the existence of such price differentials more probable or less probable than their existence would be without the finding. F.R.E. 401.

The finding is plainly irrelevant to show differentials between actual transactional prices, since it is based on a comparison of price constructs. Nor is the LTFV finding probative of differentials between "adjusted" prices. Nothing in the finding or in the record before us suggests that the adjustment made in the LTFV proceeding are the same as those which the finder of fact might consider in this case. While it might be appropriate for the finder of fact to consider adjustments of the type made by Treasury in the LTFV proceeding, the nature and amounts of any such adjustments would have to be proved at trial. Since nothing in the finding indicates the amount of the

adjustments, the factual circumstances underlying the determination that the adjustments should be made, or even the actual transactional prices to which adjustments were made, there is no basis in the LTFV finding for a jury to conclude that adjustments should be made on account of, *e.g.*, the Japanese commodity tax. Furthermore, the adjustments which are applicable under the Sherman Act may be very different from those made under the 1921 Antidumping Act, a different statute with a different purpose. Accordingly, the finding is not even relevant to proof of "adjusted" price differentials in this Sherman Act litigation.

Of equal importance is the fact that the LTFV finding is country-wide. It does not constitute a finding that any particular defendant made LTFV sales. Nor, consequently, does it constitute a finding that all of them made LTFV sales. Rather, it is an undifferentiated finding that TV receivers "from Japan" were sold at LTFV prices, and is entirely consistent with any particular defendant's having made no LTFV sales. This is especially so for the many defendants who were not investigated in the LTFV proceeding, but it is also true of the five defendants who were investigated since they were not named in the finding.

In *United States* v. *Bycer*, 593 F.2d 549 (3rd Cir. 1979), the Third Circuit reversed a jury verdict finding a pharmacist guilty of distributing controlled substances.The evidence had shown that the defendant's records failed to account for large quantities of controlled drugs, and that he and at least six other persons had access to the drugs. The Third Circuit found that the jury verdict was not supported by substantial evidence because, *inter alia*, others had access to the drugs. The fact that six persons might have distributed the drugs did not provide logical support for the conclusion that one of the six did distribute the drugs. Similarly here, the fact that an industry as a whole was found to have made LTFV sales does not provide logical support for the conclusion that any particular company made LTFV sales. We conclude that the LTFV finding is wholly irrelevant to this litigation, for the reasons stated.

2. *The Injury Finding*

The Tariff Commission finding is also irrelevant for at least two reasons. First, the Commission found that "an industry in the United States is being injured *by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.*" (Emphasis added). Since for reasons stated above LTFV sales are not relevant to the price differentials which are involved in this case, the finding of injury by reason of LTFV sales is irrelevant on its face.

Second, the Commission defines the injured industry as "facilities in the United States for the production of television receivers," and notes that the industry includes "approximately 20 firms," none of which is named in the Commission's report. Because it is a country-wide determination, the injury finding is not relevant to prove injury to Zenith or NUE. A finding of injury to an industry composed of 20 firms does not render it more probable that NUE or Zenith was injured by reason of LTFV sales. *See Bycer, supra*.

3. *The Dumping Finding*

The dumping finding is not relevant because it is a mere ministerial act which is the automatic consequence of the LTFV and injury findings. Combining the two previous findings and adding the label "dumping" cannot render the injury and LTFV findings more relevant than they are otherwise.

E. *Exclusion of Evidence Under Rule 403*

Even if we were to assume that the documents we have discussed have some probative value, we must consider whether that value is outweighted by the factors enumerated in Rule 403: "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." There is already a fairly well developed Rule 403

jurisprudence in this circuit. *See United States* v. *Long*, 574 F.2d 761 (3rd Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978); *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977); *United States* v. *Flenory*, 619 F.2d 301 (3rd Cir. 1980). The sweep of Rule 403 is best demonstrated by *Flenory*, where the court held that even an eyewitness identification of a suspect could under certain circumstances be excluded under 403. For the reasons that follow, we find that even if the documents in fact have some probative value, they would have to be excluded by reason of Rule 403.

1. *Danger of Unfair Prejudice*

Assuming arguendo the relevance of the findings, that relevance is at best minimal, yet because the findings bear the imprimatur of the United States government and use language ("less than fair value" and "dumping") that may unduly influence the jury, they present a substantial danger of unfair prejudice, similar to that presented by the admission of a prior verdict against an antitrust defendant in another case.[32] In *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975), the Third Circuit ordered a new trial specifically because evidence of a prior verdict was admitted. The court commented:

> A jury is likely to give a prior verdict against the same defendant more weight than it warrants. The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it.

525 F.2d at 1351. Since the plaintiffs' theory of relevance of the 1921 Antidumping Act findings is essentially that it is a prior decision on the same substantive issues, *Coleman* is squarely apposite.

2. *Confusion of the Issues and Misleading the Jury*

Admission of the findings would require a "minitrial" as to their trustworthiness, weight and credibility and as to their correctness under the 1921 Act. This would undoubtedly contribute to confusion of the issues. Moreover, since the findings are at best only marginally relevant, and are based on the specific legal standards of the 1921 Act and the specific adjustments made by Treasury, relating the findings to the issues in this litigation is an inherently confusing task. If the findings were admitted, the defendants would, of course, be entitled to point out to the jury, whether by argument or by bringing in testimony, that the 1921 Act findings were made under the particular standards of that Act.

3. *Considerations of Undue Delay and Waste of Time*

As the defendants have correctly pointed out, if the documents are admitted, defendants would be entitled to raise at trial all the evidentiary matters which support their contention that the documents are not trustworthy. Furthermore, they would be entitled to try to prove that the findings were wrong as a matter of interpretation of the 1921 Act. Finally, they would be entitled to trace the genesis of the findings in order to convince the jury that the documents are, in any event, irrelevant to the legal standards upon which the court would instruct them. These matters would add to the length of the trial, already projected to last a minimum of 12 months, additional time which we conservatively estimate at several

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[32] In *Carter* v. *Hewitt*, 617 F.2d 961 (3rd Cir. 1980), the Third Circuit discussed the concept of unfair prejudice at some length:

> Evidence is unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, F.R.Evid. 403. It is unfairly prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, Weinstein's Evidence 403[03] at 403-15 to 403-17 (1978). A classic example of unfair prejudice is a jury's conclusion, after hearing a recitation of a defendant's prior criminal record, that, since the defendant committed so many other crimes, he must have committed this one too. This is an improper basis of decision, and the law accordingly prohibits introduction of prior convictions to demonstrate a propensity to commit crime. F.R.Evid. 404.

617 F.2d at 972 (footnote omitted).

months. Any probative value which the documents possess is far outweighed by the undue delay that would ensue from their admission. *See John McShain, Inc.* v. *Cessna Aircraft Co., supra.*

4. *Needless Presentation of Cumulative Evidence*

Plaintiffs have argued that the documents are relevant to show (1) that defendants' prices in the United States were lower than prices of comparable models in Japan, and (2) that Zenith and NUE were injured by the price differential. The plaintiffs have developed extensive evidence of alleged price differentials between comparable models in the United States and Japan—the evidence they have prepared on this point fills many volumes of appendices to the FPS. Moreover, the plaintiffs also have ample alternative evidence which, in their contention, shows injury to them. Zenith has submitted detailed damage calculations and has named no less than five Zenith officials who will testify to injury at trial. FPS vol. 19 at 9317. The full list of evidence upon which Zenith relies to prove injury occupies more than 7 pages of the FPS, *id.* at 9317-24, of which only two lines are devoted to a citation of the Tariff Commission Report in the 1921 Act proceeding. Similarly, NUE has submitted detailed damage calculations and has set forth its injury theory at great length, with only minimal reliance on the Tariff Commission findings. FPS vol. 19 at 9325 to vol. 20 at 9686. The documents from the 1921 Act proceeding are at best needlessly cumulative of this other evidence.

In sum, even if we were to conclude that DSS #s 1 through 6 were trustworthy and minimally relevant, we would nevertheless, because of the clear result of the balancing evaluation under F.R.E. 403, be obliged to exclude them at trial.

IV. *Findings Under the Trade Expansion Act of 1962 and the Trade Act of 1974*

A. *Introduction; Overview of Trade Act Proceedings*

The next group of documents with whose admissibility we are concerned consists of records and reports of proceedings

under the Trade Expansion Act of 1962, 19 U.S.C. § 1801, *et seq.*, and its successor statute, the Trade Act of 1974, 19 U.S.C. § 2101, *et seq.*[33] The proceedings are of two general

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[33] The documents comprise DSS #s 7 through 24 and are identified as follows:

DSS # 7—Report of the U.S. Tariff Commission to the President on Investigation No. TEA 1 21 under § 301(b)(1) of the Trade Expansion Act of 1962, November, 1971 (Escape Clause proceeding). Dates covered: 1961-1970; January-June, 1971. (Television receivers and certain parts thereof).

DSS # 8—Report of the U.S. Tariff Commission to the President on Worker Investigation No. TEA-W-77 under § 301(c)(2) of the Trade Expansion Act of 1962. April, 1971. [Emerson Television and Radio Co. (NUE) Jersey City].

DSS # 9—Report of the U.S. Tariff Commission to the President on Worker Investigation No. TEA-W-21 under § 301(c)(2) of the 1962 Trade Expansion Act. [F. W. Sickles Division—General Instrument Corp., Chicopee and Ludlow, Mass.] (Electrical components and apparatus and allied products).

DSS # 10—Report of the U.S. Tariff Commission to the President on Worker Investigation TEA-W-144 under § 301(c)(2) of the 1962 Trade Expansion Act. [RCA Indianapolis].

DSS # 11—Report of the U.S. Tariff Commission to the President on Firm Investigation TEA-F-19 under § 301(c)(1) of the 1962 Trade Expansion Act [Bel-Tronics, Inc., Addison, Ill.] (coils and antennas)

DSS # 12—Report of the U.S. Tariff Commission to the President on Worker Investigation TEA-W-70 under § 301(c)(2) of the 1962 Trade Expansion Act [RCA Memphis].

DSS # 13—Report of the U.S. International Trade Commission to the President on Investigation No. TA-201-19 under § 201(b) of the Trade Act of 1974. (Escape Clause proceeding) March, 1977 (examines trend of increasing imports from 1968 through 1976). (Television receivers, color and monochrome, assembled or not assembled, finished or not finished, and sub-assemblies thereof.)

DSS # 14—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—electrical components.

DSS # 15—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—televisions.

DSS # 16—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—radios.

DSS # 17—Federal Register *Notice* of Worker Adjustment Assistance *proceeding* and *investigation* under 1974 Act re Emerson Radio and Phonograph Corp. Jersey City plant. Certifications of various Zenith plants and refusals to certify for various reasons.

DSS # 18—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act—stereos.

types: (1) so-called "Escape Clause" proceedings (§ 301(b)(1) of the 1962 Act and § 201(b) of the 1974 Act),[34] in which relief in the form, for example, of import quotas or increased duties is sought by a domestic industry from what are perceived to be the injurious effects of imports of like or competing products; and (2) trade adjustment assistance proceedings (§§ 301(c)(1) and (c)(2) of the 1962 Act and §§ 221 and 251(c) of the 1974 Act) in which an individual firm or group of workers seeks relief in such forms as trade readjustment, job search, and relocation allowances to alleviate the injurious effects of increased imports.[35]

DSS # 19—U.S. Department of Labor, Bureau of International Labor Affairs Trade Adjustment Assistance System, Report # KG400 RP2. (Computer print out of *all* applications for assistance and actions taken thereon, April 1975 through July, 1979).

DSS # 20—Continuation of 19.

DSS # 21—Department of Labor listing of "Workers employed at U.S. establishments engaged in the production of articles covered in the Japanese Consumer Electronics Products Antitrust Litigation and certified for trade adjustment assistance under the Trade Act of 1974" (April, 1975—September, 1979).

DSS # 22—Department of Labor, Bureau of International Labor Affairs. Report # KG404RP1. Listing of firms engaged in production of consumer electronics products, where trade adjustment assistance was sought and granted.

DSS # 23—Department of Labor, Employment and Training Administration. Report ETA 563. "Trade Readjustment Allowance Activities and Employability Services." Listing of payments made by investigation number. No identification of companies or what they produce.

DSS # 24—Report of the U.S. Tariff Commission to the President on Firm Investigation No. TEA-F-13 under § 301(c)(1) of the Trade Expansion Act of 1962. (Hi-fi and stereo and related equipment. Trade adjustment sought by H. H. Scott, Inc., Maynard, Mass.).

[34] These proceedings are termed "escape clause" proceedings because they provide a means by which the United States government can exercise its rights under Article XIX of the General Agreement on Tariffs and Trade to modify or revoke concessions made to other countries in the course of negotiating trade agreements, thereby providing relief to a domestic industry suffering from the effects of increased imports resulting from those concessions.

[35] There are no firm investigations under § 251(c) of the 1974 Act at issue here.

The documents at issue here include the records of two escape clause proceedings, one under the 1962 Act (DSS # 7) and one under the 1974 Act (DSS # 13). In addition, the plaintiffs offer documents from several trade adjustment assistance proceedings. DSS #s 8, 9, 10, 11, 12, and 24 relate to proceedings under the 1962 Act; and DSS #s 14, 15, 16, 17, and 18 relate to adjustment proceedings under the 1974 Act. The procedures under the 1962 and 1974 Acts are (with some minor differences not germane to the issues before us)[36] essentially the same.

In an escape clause proceeding under § 301(b)(1) of the 1962 Act, the task of the Tariff Commission is to determine whether (1) as a result in major part of concessions granted under trade agreements, (2) an article is being imported into the United States in such increased quantities, (3) as to cause or threaten to cause serious injury to the domestic industry producing like or competitive articles.

In an escape clause proceeding under § 201(b) of the 1974 Act, the International Trade Commission is charged with determining whether (1) the articles under investigation are being imported in increased quantities, (2) the domestic industry producing like or competitive articles is being seriously injured or threatened with serious injury, and (3) increased imports are a substantial cause of the injury or threat. Trade concessions are no longer a concern, and increased imports need only be a substantial (rather than the major) cause of injury.

Trade adjustment proceedings under §§ 301(c)(1) [firms] and 301(c)(2) [workers] of the 1962 Act are conducted to deter-

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[36] For example, under the 1962 Act both escape clause and trade adjustment assistance investigations were conducted by the United States Tariff Commission; under the 1974 Act, escape clause investigations are conducted by the United States International Trade Commission. Firm investigations and worker investigations are conducted by the Department of Commerce and Labor respectively. For purposes of this section of the opinion, we will, from time to time, refer to both the Tariff Commission and its successor, the International Trade Commission, as the "Commission."

mine whether trade concession agreements have led to increased imports with resulting injury to a particular firm or group of workers. In trade adjustment assistance proceedings under § 221 of the 1974 Act [workers] and § 251(c) [firms] the Department of Labor and the Department of Commerce respectively must determine whether (1) a significant number of workers in a firm have become separated or threatened with separation, (2) sales and/or production have declined absolutely, (3) competitive articles are being imported in increased quantities, and (4) increased imports have contributed importantly to the separation and decline in sales and/or production.

B. *The Escape Clause Proceedings in Question*

The 1962 Act escape clause investigation was instituted on June 8, 1971, upon petition filed with the Commission by three major unions representing workers in the United States television receiver industry. The petitioners alleged that imports of television receivers had seriously injured the domestic industry and that the 1930 rate of duty (35 percent ad valorem) must be restored to remedy the injury. The 1974 Act investigation was initiated in October, 1976, upon petition from eleven unions and five firms representing or employing workers in the television industry.[37] As required by statute, in each case the Commission gave public notice of the investigations and of hearings to be held. At the hearings interested parties were given the opportunity to be present, offer evidence, and be heard. Counsel for certain defendants in this case appeared at the § 201(b) proceeding. While witnesses were available for cross-examination, they were permitted to refuse to answer

[37] The petition filed under the 1974 Act requested an investigation with respect to imports of color television receivers. The Commission, however, instituted proceedings to determine whether television receivers, color or monochrome, assembled or not assembled, finished or not finished and subassemblies thereof, were being imported in such increased quantities as to cause serious injury to a domestic industry. Thus, the investigation conducted was much broader than the investigation sought by petitioners.

questions that called for the disclosure of what the witnesses regarded as confidential business data. In fact, this privilege was invoked numerous times at both proceedings.[38]

Following each of the hearings, the commissioners rendered their decisions, which were based not only on evidence adduced at the hearings but also upon the staff reports prepared following the hearings, which in turn relied upon data and information obtained from various sources including the Commission's own files and those of other governmental agencies. More important from defendants' point of view is the fact that in both proceedings the Commission and staff elicited (and presumably relied upon) information from domestic producers and importers through field investigation and questionnaires. This information was submitted in confidence and has never been disclosed.

At the conclusion of each of the escape clause proceedings, the staff reports, together with the decisions of the Commission, (and the separate concurring and dissenting views of the various commissioners) were sent to the President, along with copies of the transcripts of the hearings and briefs submitted by interested parties. The decisions and the reports were made public, but with the confidential data deleted.

In the 1962 Act (§ 301) proceeding, the results of which were submitted to the President in November, 1971, the Commission made a negative determination—that is, while the Commission found that imports were increasing, it did not agree that such increase was the result in major part of trade concessions.[39] The question of injury to a domestic industry was

[38] *See* n. 24 *supra*. The Walders affidavit, which as we have noted is uncontroverted, includes excerpts from the transcripts of both escape clause proceedings, in which the "business privilege" was invoked several times.

[39] The majority view (3 commissioners) was that a number of factors other than trade concessions had brought pressure to bear on the American television receiver industry. Among the factors identified by these commissioners were the dumping of television receivers by Japanese producers, a variety of export incentives provided by the Japanese government and television industry, a rapid increase in Japanese labor productivity and the substantially

not reached. In the 1974 Act (§ 201) proceeding which concluded in March, 1977, the Commission found that imports were increasing and that such increased imports were a substantial cause of serious injury or threat of serious injury to the domestic industry producing like or competitive goods.

C. *The Trade Adjustment Assistance Proceedings*

The plaintiffs also seek to introduce into evidence a large number of documents relating to proceedings brought under §§ 301(c)(1) and (2) of the 1962 Act and § 221 of the 1974 Act. With the exception of DSS # 8, which relates to an investigation instituted on behalf of Emerson (NUE) workers in Jersey City, New Jersey, and DSS # 17 which relates to proceedings on behalf of NUE and Zenith workers, these documents concern workers or firms in the electronics industry other than plaintiffs.

The procedures governing trade adjustment investigations are essentially the same as those governing escape clause proceedings with one important exception—no hearing is held unless requested by an interested party. In none of the proceedings involving either plaintiff here was a hearing held. Like the investigations under the escape clause provisions, these investigations permit ex parte communications and involve receipt of confidential data.

D. *Statistical Data*

In addition to the records made and decisions rendered in escape clause and trade adjustment proceedings, plaintiffs

lower wages there, exchange rates favorable to the yen, and the joint sharing of research and development work and costs by Japanese producers. One commissioner found that trade concessions could not have been the cause of the increase in imports since they had been granted some years before the increase. This commissioner also found that dumping by Japanese producers and the duty saving provision in the U.S. tariff schedules had contributed to the increase in imports. One commissioner found the "operating environment" of the Japanese television industry to have contributed to the increase. One commissioner found that the statutory criteria had been satisfied and that relief should have been granted.

seek to introduce various computer printouts and lists supplied by the Department of Labor (DSS #s 19 through 23). These documents will be described and discussed *infra*.

E. *The Hearsay Objection*

Like the documents offered from the 1921 Act proceedings, the materials described above constitute hearsay. Defendants object to their admission, which is sought under the 803(8)(C) exception, on the grounds that they do not constitute findings within the meaning of the rule and are not trustworthy.

1. *The Escape Clause Proceedings*

a. *Did the Commission Make 803(8)(C) Findings*

The investigations conducted under § 301(b)(1) of the 1962 Trade Expansion Act and § 201(b) of the 1974 Trade Act and § 201(b) of the 1974 Trade Act produced what we term formal or ultimate findings by the Commission: in the former case that the statutory criteria for relief had not been met—in essence a negative finding (although all commissioners agreed that imports were increasing), *see* n. 39 *supra;* and in the latter case a finding that the U.S. industry producing color and monochrome television receivers, assembled or unassembled, finished or unfinished, and subassemblies thereof was being seriously injured or threatened with serious injury and that increased imports were a substantial cause of that injury or threat. These are findings within the meaning of 803(8)(C).

In addition to these "ultimate" findings plaintiffs seek to introduce as findings various excerpts from the opinions of individual commissioners in each proceeding. In our view, these opinions do not constitute "findings" within the meaning of Rule 803(8)(C) and may not be introduced under that exception, even though the commissioner's individual remarks quite literally constitute conclusions made by officers of a public agency following an investigation. Each commissioner was provided with the same data; the conclusions they reached individually, however, range from slightly divergent to com-

pletely at odds.[40] Even in the 201(b) proceeding under the 1974 Act, where the commissioners were unanimous in their finding that increased imports had caused injury to a U.S. industry, they did not agree on the definition of the affected industry (the majority found injury to producers of "color and monochrome receivers, assembled or unassembled, finished or unfinished, and subassemblies thereof"; the concurring members found injury only as to color television receivers, and differed among themselves as to the further definitions (assembled v. unassembled, finished v. unfinished, etc.). To give the individual opinions to the jury and let its members decide which are correct and which are not would be to permit the purest speculation, for the jury members would be considering the opinions in a vacuum. The process would be similar to that required when a jury must decide which of two experts in a personal injury case is the correct one, but here the fact-finder would not have the benefit of information elicited on cross examination.

Were these opinions to be admitted, it would be essential that the staff reports be admitted as well, so that the jury could review the data and conclusions upon which the opinions were based. However, even though the staff reports set forth a multitude of declarative sentences stated as fact and may thus be said to include "findings," we have already concluded that only the staff findings that are adopted by the public agency are admissible under 803(8)(C). See p. 1145 *supra*. In addition, the staff reports present problems in terms of trustworthiness.

b. *Trustworthiness*

In determining whether these reports and the findings contained therein are trustworthy within the meaning of Rule

[40] Although in both proceedings there are factual conclusions that are agreed upon by some or all of the commissioners, plaintiffs have insisted upon offering the entire records of these investigations, including the dissenting views. While we could no doubt ferret out the areas of agreement and term them findings within what we perceive to be the meaning of 803(8)(C), we are somewhat reluctant to undertake what would be a lengthy exercise in light of our conclusions regarding the trustworthiness of these proceedings.

803(8)(C), we have considered in addition to the factors identified by the Advisory Committee as bearing upon the question, certain of the factors we have described *supra* that seem to us to have relevance to a trustworthiness determination. We note that defendants have not contended that the investigations were untimely, and indeed the statutory mechanism governing an escape clause proceeding requires that a decision be rendered within six months after the petition seeking relief is filed. We note further that a hearing was held in each of the escape clause proceedings at issue here again as required by statute. The agency conducting the investigations (the Tariff Commission and International Trade Commission respectively) has expertise in the areas of imports and foreign trade, and there has been no suggestion that the commissioners or their staffs were not acting impartially in discharging their duties.[41] Other factors that we have identified have given us some pause, however, and have led us to conclude that these reports and findings are not trustworthy for purposes of this lawsuit.

Of major importance to this conclusion is the extent to which these findings are based upon or are the product of proceedings pervaded by the receipt of substantial amounts of material that would not be admissible in evidence. (Criterion # 2, *supra*). As noted above, in conducting an escape clause investigation, the Commission relies not only upon evidence adduced at the hearings (which themselves permit the admission of hearsay) but also upon confidential data supplied by domestic producers

[41] In this connection, it is worth noting, however, the remark of one of plaintiffs' expert witnesses, Stanley Nehmer, in an address delivered to the symposium "Understanding What's 'Fair' and 'Unfair' in International Trade," in March, 1979: "In agencies which exercise a considerable influence on U.S. trade policy, such as the State Department and the Treasury Department, the prevailing view all too often is that trade issues must be subordinated to larger U.S. foreign policy objectives." This statement suggests that governmental agencies, however objective we might presume them to be in discharging their various tasks, must nonetheless be aware of and responsive to the large policy concerns that must necessarily inform the conduct of a world power. The escape clause findings may thus be subject to a trustworthiness attack under our criterion # 5. See discussion *infra* at 1167.

either in response to questionnaires or in interviews. There are three serious problems raised by this procedure. First, the data and information submitted in confidence is not made a part of the public record so that its accuracy and trustworthiness has never been and can never be explored. Second, this data is critical to a determination by the Commission, relating as it does to such matters as domestic production figures and prices, yet, since it is submitted in confidence and is deleted from the public record, there is no way to determine the extent to which it was relied upon by the Commission in rendering its decision or by the staff in preparing its report. Since the record is incomplete (*see* criterion # 4), the reasonableness of the ultimate findings by the Commission or of the views of individual commissioners cannot be ascertained. Third, while the Commission and its staff do manage to qualify as disinterested investigators, *but see* p. 1167 *infra*, many of the suppliers of the confidential information do not, since they were domestic producers for whose benefit the escape clause proceedings were initiated. Because they had a stake in the outcome of the proceedings and knew that the information they supplied was confidential, we feel less inclined to assume the data they supplied was complete and correct than we otherwise might be.

The consideration of such confidential data as is described above implicates the validity of the agency's expression of expertise as well. (Criterion # 7, *supra*). To the extent that the Commission was functioning as an expert, the provisions of the rules of evidence governing the receipt of expert opinion are useful in analyzing the trustworthiness question here. Even assuming that the confidential facts and data employed by the Commission were of a type reasonably relied on by experts in the particular field (Rule 703) and, therefore, that they need not themselves be admissible into evidence, Rule 705 provides that the expert may be required to disclose the underlying facts or data on cross examination. Here, not only are the commissioners not available for cross examination, but the trustworthiness of the underlying data can in no other way be explored since the data itself is confidential.

In addition to the fact that the Commission received and considered confidential data, it is clear that other hearsay was the basis of many of the "factual" or declarative statements made in the staff reports and in the opinions of the individual commissioners. The sources of those declarative statements are rarely disclosed. In many instances where they are disclosed, it is clear that the sources are or may be unreliable, *e.g.*, Fairchild News Service, *T.V. Digest*, Report of U.S. Embassy in Tokyo. Moreover, in the escape clause proceeding conducted under the 1962 Act, the staff and the individual commissioners relied in great part on the dumping proceedings discussed *supra*. Indeed, it appears that the Commission's inability to decide that imports were increasing as a result in major part of trade concessions rests largely on the dumping determinations, which we have found to be both untrustworthy and irrelevant to these proceedings. Since we have concluded that the 1921 Act materials cannot be admitted in their own right, the conclusion that they cannot be admitted as part of the record of another proceeding is inescapable. (Criterion # 6, *supra*).

Finally, we note that the findings made in the escape clause proceedings were made in the context of a protectionist statute, which reflects purposes and policies different from those reflected in the antitrust laws and at least potentially at odds with them, since protectionism shelters U.S. industry from competition, fair or not. Because there appear to be policy as well as investigative and adjudicative considerations involved in these proceedings, *see* n. 41 *supra*, it is our view that the findings are at least in part a function of those policy considerations, which underlie the statutes defining the charter of an escape clause investigation, and in this sense the findings may not be trustworthy for purposes of an antitrust proceeding (criterion # 5 *supra*), though the fact that the issues before the Tariff Commission differed from those before us also bears, and perhaps more directly, on the question of relevance.

In sum, we conclude that the findings made in the escape clause proceedings, even if construed broadly to include state-

ments of fact made by individual commissioners and their staffs, must be excluded as untrustworthy. This conclusion stems largely from the fact that the proceedings are pervaded by the receipt and consideration of confidential data, the validity of which has never been and can never be explored or tested. What is before us is an incomplete record with salient information deleted. In addition, we are troubled by the Commission's apparent use of other unreliable hearsay and by the extent to which the 1921 Dumping Act findings infiltrate the record of the § 301(b) proceeding. These considerations coupled with the fact that the escape clause investigations were conducted under statutes whose aims and purposes are different from those of the antitrust laws, force us to conclude that the records of the escape clause proceedings are not trustworthy for purposes of this action.

2. *The Trade Adjustment Assistance Proceedings*

We also have before us the results of trade adjustment assistance proceedings conducted under both the 1962 and the 1974 Acts. The proceedings under the 1962 Act produced records similar to those produced in the escape clause proceedings, consisting of: (1) a determination by the Commission of whether the statutory requirements for relief had been met, *i.e.*, whether as a result in major part of trade concessions, articles were being imported in such increased quantities as to cause or threaten to cause serious unemployment or underemployment to workers in a domestic industry (§ 301(c)(2)) or to a firm (§ 301(c)(1)); (2) the views of the individual commissioners; and (3) the staff reports. The documents submitted in connection with proceedings under the 1974 Act consist only of the determination by the Secretary of Labor that the statutory criteria for eligibility for relief had or had not been met and a summary of the reasons for so concluding. We deal with the proceedings under each of the Acts separately, since they raise somewhat different problems as to whether they contain findings, what the findings consist of, and whether they are trustworthy.

a. *Were 803(8)(C) Findings Made*

The 1962 Act proceedings at issue here comprise DSS #s 8, 9, 10, 11, 12 and 24 and include both worker and firm investigations. In all but one of the investigations, the Commission could not agree upon a result, the commissioners being equally divided as to whether the statutory criteria had been met, so that the reports issued to the President contained no formal or ultimate findings under §§ 301(c)(1) or (c)(2) and concomitantly no recommendations.[42] In Worker Investigation No. TEA-W-144 (DSS # 10), which was instituted by a petition filed on behalf of workers at the RCA Corporation plant at Indianapolis, Indiana, the Commission unanimously found that articles like or directly competitive with unrecorded magnetic tape were not as a result in major part of trade concessions being imported in such increased quantities as to cause or threaten unemployment or underemployment of a significant number of workers. As to other products manufactured at the plant (television yokes, tuners and horizontal output transformers), the Commission was equally divided and made no finding.

Thus, in all but one of these proceedings, there are no formal findings at all. Furthermore, for the reasons set forth above, we conclude that the views of the individual commissioners and the statements of fact in the staff reports cannot be termed 803(8)(C) "findings."

Worker trade adjustment assistance proceedings brought under the 1974 Act are the subject of DSS #s 14, 15, 16, 17, and 18. With the exception of DSS # 17, which relates specifically to proceedings on behalf of NUE workers in Jersey City and Zenith workers at various locations across the country, each DSS contains the results of several individual worker adjustment investigations in a particular industry, *e.g.*, stereos,

[42] Although there is nothing in the record to indicate what action, if any, the President took upon receiving these reports, plaintiffs have represented to us that in each case where the Commission split, the President granted relief. We do not believe such action converts a nonfinding into a finding.

televisions, all as summarized in the *Federal Register* "Notices of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance." Each summary offered here (except for those in DSS # 17 discussed *infra*) contains an affirmative finding—that a significant number of workers at a particular firm or subdivision thereof have become totally or partially separated (or are threatened with total or partial separation); that sales or production or both of such firm have decreased absolutely; and that increased imports of like or competitive products contributed importantly to such separation, or threat, and to such decline in sales and/or production. In addition, each summary contains what may be termed subsidiary findings, that is, declarative statements containing statistical data supporting the various ultimate findings of increased imports, declines in production, etc.[43] Because the findings are those of a single employee of the Department of Labor, these summaries do not present the conflicting views and conclusions that characterized proceedings conducted by the Tariff Commission.

Unlike the other groups of documents relating to trade adjustment proceedings under the 1974 Act, DSS #17 contains both certifications and denials of certification of eligibility for worker assistance. These documents relate specifically to workers employed by plaintiffs. The only document offered that relates to NUE workers is a *Federal Register* notice that a proceeding has been instituted on behalf of workers at Emerson's Jersey City plant. This notice does not, of course, constitute a finding.

Plaintiffs have also offered *Federal Register* summaries of nine proceedings on behalf of Zenith workers at various plants throughout the United States. Of these, five resulted in a negative determination, *i.e.*, that the statutory criteria for relief had not been met. In addition to such "ultimate findings,"

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[43] These "subsidiary findings" are essentially equivalent to the statements in the staff reports submitted in connection with worker and firm investigations under the 1962 Act.

these summaries include subsidiary findings in the form of discussions of the reasons why a particular requirement is deemed not to have been fulfilled (e.g., sales or production have not declined absolutely). There is a disclaimer of any findings as to the other criteria.

In three Zenith investigations, the petitioning workers were certified as eligible to apply for relief. These proceedings thus contain the ultimate finding that each of the statutory requirements has been fulfilled, as well as subsidiary statistical findings in support of these conclusions. One investigation resulted in a negative determination as to workers in a certain division of two different Zenith plants and a positive determination as to workers in other divisions of these plants.

We conclude that the ultimate and subsidiary findings contained in these summaries of worker adjustment proceedings under the 1974 Act qualify as findings within the meaning of 803(8)(C).

b. *Trustworthiness*

The documents offered from the trade adjustment assistance proceedings present problems of trustworthiness like those we found in analyzing the escape clause proceedings. All of these investigations, whether conducted by the Tariff Commission under the 1962 Act of the Department of Labor under the 1974 Act, are pervaded by confidential and hearsay data elicited from parties with a stake in the outcome. The records submitted from the 1962 Act proceedings contain large gaps where confidential (and critical) material was deleted. The documents submitted from the 1974 Act proceedings are summaries only and contain no citations to sources. Moreover, in none of these proceedings was a hearing required and in the great majority of them no hearing was held. Finally, we note the task before the various agencies in these investigations was defined and limited by the scope of trade acts whose purposes are protectionist, and thus the issues considered diverge sharply from those before us, and have policy overtones.

For all the foregoing reasons, we do not believe that conclusions in the trade adjustment assistance proceedings can be deemed trustworthy for purposes of this case.

F. *The Relevancy Objection*

1. *The Escape Clause Proceedings*

Even if deemed trustworthy, the findings made by the Tariff and International Trade Commissions in their respective investigations are not relevant to the issues in this case for the following reasons.[44]

First, the finding of the Tariff Commission in the 1962 Act proceeding was essentially a negative finding and could be offered to prove no more than that trade concessions did not contribute to an increase in imports which in turn threatened or caused serious injury to a domestic industry, a fact that bears no relationship to any of the issues before us in this antitrust action.

Second, the finding of injury to the domestic industry producing television receivers in the 1974 Act escape clause proceeding was an industry-wide finding that considered imports from all sources and did not specifically or necessarily include a finding of injury to these plaintiffs[45] or imports from these defendants. As we have noted, *supra* at 1157-1158, the fact that an industry as a whole is found to have suffered injury or that export activity world-wide is found to have been a substantial cause of that injury does not provide logical sup-

[44] We make no rulings as to the admissibility of these documents in connection with the defendants' "sham litigation" counterclaim. *See* discussion *supra* at 1139.

[45] In making its determinations with respect to injury, the Commission must consider "the inability of a significant number of firms to operate at a reasonable level of profit." 19 U.S.C. § 2251(b)(2). The Commission's report states that in 1976 the domestic television receiver industry comprised twelve firms. A finding of injury to that industry is thus a finding of injury to a significant number of firms, but not necessarily to all of them. In any event, the injured firms are not identified.

port for the conclusion that any particular domestic firm has been injured or that imports from any particular country or foreign producer have been the cause of that injury. Even more attenuated is plaintiffs' argument that the industry-wide injury determination can support a finding of a causal connection between the putative anti-competitive acts of these defendants and the injury these plaintiffs are said to have suffered, for not only are these parties not identified in the escape clause findings, but the means by which the increase in imports had been effected was not considered or discussed by the Commission. Thus, the injury could as easily have resulted from fair as from unfair competition.[46] The inference that the injury resulted from antitrust violations simply cannot be drawn from these materials.

Similarly, though plaintiffs have argued to the contrary, the escape clause findings are not relevant as proof of intent to affect United States commerce and of actual effect on that commerce for purposes of subject matter jurisdiction,[47] or as proof of predatory intent and anticompetitive effects for purposes of the substantive violations alleged here. As we have observed, a finding that imports from all sources have injured a domestic industry does not logically support the inference that imports from these defendants have had that effect or that these defendants intended that effect. We note further that even if we were to assume that some inferences could be drawn about these parties from the documents at issue here, those inferences are not nearly so sweeping as plaintiffs would claim.

Seizing upon the legal maxim that a party is deemed to intend the natural and probable consequences of his acts[48]

[46] The Commission specifically declined to make any findings regarding the antitrust violations at issue in this litigation.

[47] *See* Opinion (Introduction to Summary Judgment Motions; Subject Matter Jurisdiction), *Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1161 (E.D.Pa. 1980).

[48] In a criminal proceeding, the jury may not be instructed that the law *presumes* that a party intends the natural and probable consequences of his voluntary acts, though the jury may infer that a person so intends. *United*

(rescribed in our opinion on subject matter jurisdiction, *supra*, n. 66), plaintiffs posit that defendants' anticompetitive intent can be inferred from the finding of injury. This argument ignores that such an inference could be drawn only if plaintiffs also produced proof of anitcompetitive acts. Intent cannot be inferred from consequences (effects) alone. The escape clause proceedings do not implicate any conduct other than the act of exporting.[49] In fact, as we have noted *supra* n. 46, in the § 201 proceeding the Commission specifically made no findings regarding the antitrust issues in this litigation.

For all of the above reasons, we have concluded that the escape clause proceedings are not relevant in the litigation before us.

2. *Trade Adjustment Assistance Proceedings*

As we earlier observed, the trade adjustment assistance proceedings conducted under the 1962 Act in all cases but one resulted in a split of opinion among the commissioners and, therefore, in no formal findings. Even if we were to glean proper 803(8)(C) findings from these records, however, we would nevertheless be moved to exclude them on grounds of relevancy, since they do not tend to make more or less probable the existence of any fact of consequence to the determination of the action. F.R.E. 401. Like the escape clause proceedings, these investigations considered imports from all sources, not just from Japan or from these defendants. Furthermore, only one of these investigations involved a plaintiff in this lawsuit (DSS # 8-Emerson [NUE] workers). The probative value here of a nonfinding as to nonplaintiffs is nil. The Emerson proceeding is of no probative value since it is one of the split decisions and, again, involved imports from all sources.

States v. *United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Whether this standard would apply in a civil action is doubtful, but in neither the criminal nor civil context could the acts themselves be presumed or inferred from proof of the consequences or effects alone.

[49] Of course, the report of the § 301(b) proceeding refers at some length to the 1921 Act dumping investigations the results of which we have previously concluded are inadmissible in their own right. See Part III *supra*.

Similarly, we have concluded that the trade adjustment assistance investigations under the 1974 Act that relate to workers at plants other than those of plaintiffs must be excluded as irrelevant to this proceeding. In addition to bearing not at all on any injury these plaintiffs might have suffered, they relate to imports from all sources and consider an injury that could have resulted from fair competition. Thus they do not advance the proof of injury to competition required by the antitrust laws or of injury to these plaintiffs, required in a private treble damage action. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

As to the nine proceedings involving Zenith workers, we find that they suffer from some of the same relevancy problems as the other trade adjustment assistance investigations and from some additional problems of their own.

First, as we have already noted, in five of the proceedings, the only findings were negative findings—that the statutory criteria for relief had not been met. The discussion of which criterion had not been fulfilled, *e.g.*, production had not declined or increased imports did not contribute importantly to layoffs, is in each case wholly unrelated to any allegation Zenith would seek to prove in this case. In the proceedings in which affirmative determinations were made, those determinations were based on a consideration of imports from all sources and include a finding of injury from competition that may or may not have been unfair. Furthermore, as defendants have pointed out, the injury found is injury to Zenith *workers*, not to Zenith, who is, after all, the plaintiff here. In fact, in two instances Zenith's own imports from Taiwan and Mexico were specifically cited as contributing to the increase in imports that led to the injury. Under these circumstances, we conclude that these injury determinations are not relevant to this proceeding.

G. *Exclusion of Evidence Under Rule 403*

The Rule 403 considerations that informed our discussion of the Antidumping Act materials are equally relevant here, and so we need but summarize them as applied in the present context. For purposes of analysis we must and do assume that the proffered materials pass the minimal relevancy threshold of Rule 401.

Even given this assumption, however, we conclude that the probative value of the results of the escape clause and trade adjustment assistance proceedings is very low and is far outweighed by the unfair prejudice of introducing findings by governmental agencies that domestic industries, workers, and firms have been injured as a result of increased imports. *Cf.*, *Coleman Motor v. Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975) (error to admit prior jury verdict that defendant had committed antitrust violation). Furthermore, there is the added danger of misleading the jury into thinking that the injury found by the International Trade Commission and the Department of Labor is coterminous with the injury that must be shown in an antitrust case.

Just as we noted in our discussion of the Antidumping Act materials, if these documents are admitted, defendants would be entitled to launch an attack on both their trustworthiness and their probative value—a process that could potentially entail exploring each of the trade adjustment and escape clause proceedings and the significance of the evidence upon which the determinations were based. Given what we have deemed to be at best the limited probative value of these documents, and given the prospect of enormous delay, waste of time, and confusion of the issues such a process would inevitably entail, we can conceive of no circumstances under which we would admit the proffered proceedings at trial.

Finally, we note that these documents are needlessly cumulative of other evidence on the issue of injury to these plaintiffs and to competition in general. *See* discussion *supra* at 1184.

H. *Miscellaneous Documents*

In addition to the documents discussed at length above, plaintiffs have submitted in DSS #s 19 through 23 lists of various kinds supplied by the Department of Labor that provide summaries of activities of that agency in connection with its involvement in trade adjustment assistance proceedings. These data compilations are more properly characterized as 803(8)(A) or perhaps 803(8)(B) materials than as 803(8)(C) documents.

DSS #s 19 and 20 are made up of a computer print-out that lists *all* applications for adjustment assistance and actions taken thereon, filed with the Department of Labor from April 4, 1975, through July 31, 1979. While we have no doubt that this list provides an accurate survey of Department of Labor activities and therefore may be deemed trustworthy as proof that the petitions and actions listed therein were in fact filed and did in fact occur, we question its relevance since it contains applications from workers in all kinds of domestic industries (*e.g.*, shoes, clothing). To the extent that it includes worker applications relating to products at issue in this case, it would appear to be cumulative in light of DSS #s 21 and 22 which list firms producing consumer electonics products whose workers applied for and were certified as eligible to receive trade adjustment assistance benefits under the 1974 Act. The problem with DSS #s 21 and 22 is that the data compilations merely reflect the results of the § 221 proceedings described above and the actions taken in connection therewith, so to the extent that the results of the proceedings are either untrustworthy or irrelevant to issues here, so too would be any substantive inferences that might be drawn from the reports, although as noted, the reports themselves may accurately reflect the actions taken by the Department of Labor.

DSS # 23 is a Department of Labor report summarizing trade readjustment allowance activities and employability services. The data is compiled geographically and then subdivided by investigation number. There is no way to determine what industry each investigation relates to, though if this list

were matched with others, identifying both the firm and the investigation number, it would be possible to do so. Standing alone, the list is useless. Like the other listings submitted here, this document can be deemed to accurately reflect only the data recorded and could not in any event be used for substantive proof of any issue here. Thus the miscellaneous documents are inadmissible.

V. *The Records and Findings of the Japanese Fair Trade Commission (JFTC)*

A. *Nature of the Proceedings Before the JFTC*

DSS #s 25 and 26 pertain to proceedings before the Japanese Fair Trade Commission (JFTC). In order to understand the nature of those documents, a description of the Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade, Act No. 54 of 1947 (the "Anti-Monopoly Law"), which is enforced by the JFTC, is necessary. Our information is gleaned from numerous affidavits filed by expert witnesses from both sides, as well as from the testimony of plaintiffs' expert, Professor John Owen Haley of the University of Washington Law School, and from our independent reading of the Japanese Anti-Monopoly Law and the regulations promulgated thereunder.[50]

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[50] Professor Haley specializes in Japanese law, teaching courses on the Japanese legal system, U.S. Japanese contract and sales problems, Japanese administrative law, and Japanese business relations in Japan, which includes work in Japanese antitrust law. He speaks and writes Japanese, and was for over two years employed in Japanese law offices in Osaka and Tokyo. He is editor of the principal English language periodical on Japanese law, and is a member of various committees and organizations related to Japanese and East Asian law.

Professor Haley submitted a series of affidavits, two of which, those of February 1, 1979 and May 27, 1980, are relevant to the Japanese Fair Trade Commission issues. Additionally, Professor Haley testified before us on June 24, 1980. We have also considered a number of affidavits submitted by experts on behalf of defendants, principally those of Professor Mitsuo Matsushita, signed on March 25, 1980 and June 10, 1980, and those of Dr. Michigo Ariga, signed April 17, 1979, June 15, 1980, and June 16, 1980.

The Japanese Anti-Monopoly Law is similar in purpose to the U.S. antitrust laws. As described in Sec. 1,

> This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint on production, sale, price, technology, and the like, and all

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Professor Matsushita is Associate Professor of Law at Sophia University, Tokyo, Japan, where he teaches Japanese antimonopoly law. He is fluent in English, and has lectured as a visiting professor on Japanese antimonopoly law at American law schools. He is the author of over 100 articles in both Japanese and English, as well as numerous books, dealing with Japanese antimonopoly law. He has been appointed to several task forces created by the JFTC to study various antimonopoly law problems, and is at present a member of two such task forces studying Japanese antimonopoly law and international trade. He has no family relationship to any present or former employee, officer, or principal of any of the Matsushita defendants in this litigation.

Dr. Ariga is advisor to the law firm of Shimoda and Sakamoto in Tokyo and serves as the Head Representative of the Japanese government at plenary meetings of the Transnational Corporation Committee of the United Nations. She is proficient in both written and spoken English, has taught courses in Japanese antimonopoly law both in Japan and in the United States, and has written articles in both Japanese and English on the Japanese Anti-Monopoly Law. She served with the Japanese Fair Trade Commission for approximately twenty-five years in various capacities, culminated by five years as a Commissioner.

There are a number of instances in which the views of Professor Haley conflict with those of Drs. Matsushita and Ariga. In these instances we have followed the views of Drs. Matsushita and Ariga, believing these individuals to have greater understanding of the Japanese Antimonopoly Law and JFTC procedures. While we have a high regard for Prof. Haley, because he lacked actual knowledge of the workings of the JFTC, we found his views to be less persuasive than those of Drs. Matsushita and Ariga. Prof. Haley did not contradict any factual statements made in the affidavits of Drs. Matsushita and Ariga, admitting they were "essentially correct" and stating that the "rumors of disagreement between us are greatly exaggerated." Pretrial Order No. 264 at 269. Instead, the differences are in the experts' respective conclusions and characterizations; it is in this area that the personal knowledge of Drs. Matsushita and Ariga becomes vital. It should be noted that such judgments are plainly within the province of the court as proof of foreign law. *See* Fed.R.Civ.P. 44.1.

other undue restrictions of business activities through combination, agreements, etc., aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and peoples' real income, and thereby to promote the democratic and wholesome development of the national economy as well as to insure the interests of consumers in general.

The Anti-Monopoly Law includes among its provisions a prohibition against private monopolization and unreasonable restraints of trade (§ 3); a prohibition against unfair methods of competition (§ 19); a prohibition against undue disparity of economic power (§ 8); a prohibition against the formation of holding companies (§ 9); and a prohibition against certain interlocking directorships (§ 13).

The JFTC, similar to our Federal Trade Commission, was established by the Anti-Monopoly Law in order to effectuate the Act's purposes. While private actions are cognizable under Japanese law, they are extremely rare[51] and, for practical purposes, the JFTC is the sole enforcement mechanism of Japanese antitrust law.

The JFTC is an independent governmental agency, composed of a Chairman and four Commissioners, appointed by the Prime Minister, with the consent of both houses of the Diet. The staff of the JFTC, which is broken down into an economic division, a trade practices division, and an investigation division, includes trial examiners selected from staff office personnel, "whose duty it [is] to handle the proceedings," but who are expressly denied the authority to render any actual decision. Anti-Monopoly Law, Art. 35.

Under the Anti-Monopoly Act and the JFTC's "Regulation Concerning Investigation and Hearing by the Fair Trade Commission, Fair Trade Commission Regulation No. 5, Oct. 19, 1953, as amended ("Regulations"), JFTC proceedings comprise two principal stages. The first, or investigative, stage culminates in the initiation of a formal action. Under Sec. 45 of the Act and Art. 9 of the Regulations, an investigation conducted by members of the Commission staff may commence either upon the request of an outside party or by the Commission on its own authority. During this preliminary investigation, the staff can move from a highly unstructured initial screening process to a slightly less informal one by invoking certain legal processes to obtain information, including compulsory process, spot inspections, the interrogation of witnesses, the taking of statements, and the use of expert testimony. While the Act provides for notice to be forwarded to a suspected violator and while a respondent can object to a demand for certain information upon an appropriate motion, for the most part the rights accorded a respondent during the investigation stage are limit[illegible]. There is, for example, no right to cross examination.

[51] According to Dr. Ariga, there have been only two private suits for damages under the Japanese Anti-Monopoly Act since its adoption in 1947. While others have suggested that there may have been four or five such suit[illegible] clear that whatever the actual number, such suits are unusual.

At the close of the investigation, a staff report, setting forth the "incipiency" of the violation, the investigative process, a synopsis of the facts of the case, applicable legal provisions, and the opinion of the investigator is transmitted to the Commission. *Regulations*, Art. 18(2). If the Commission deems a violation to be likely, it issues a "Recommendation" to the respondent. Such a Recommendation includes facts and application of the law, as well as measures to be taken to eliminate the violation. As described in the affidavit of Dr. Ariga, *see* note 50, *supra*, the facts set forth in the Recommendation are those which had been set forth in the staff report, and the Commission relies upon that report rather than inquire into the evidence at that preliminary stage. The purpose of the factual recitation is to preclude initiation in the future of any proceedings based upon the same facts, and to provide a context within which the respondent is to take measures to eliminate the suspected violation.

The respondent may either accept or reject the Recommendation. If the Recommendation is accepted, the Commission

issues a "Recommendation Decision" without resorting to a hearing. According to the affidavits of both Drs. Matsushita, *see* note 50, *supra*, and Ariga, the description of the alleged violation as outlined in the Recommendation Decision is identical to that of the original Recommendation, as required by Sec. 48(4) of the Anti-Monopoly Law. The purpose of this system is to obtain early settlement of disputes.

Should the respondent reject the Commission's recommendation, the Commission serves a Complaint upon the respondent, thus initiating the second, or hearing, stage of the JFTC's investigative proceedings. This Complaint sets forth the suggested violation in a manner identical to that of the previously issued Recommendation. At this point, the Commission may appoint a hearing examiner to conduct formal hearings. Unlike the preliminary investigation phase, the respondent is now afforded many legal rights such as counsel, cross-examination, and the presentation of a defense.

At any time after the Complaint is served, but before the Commission renders a final decision, the respondent may agree to entry of a "Consent Decision" by submitting

> to the Fair Trade Commission a written statement setting forth that he admits the findings of fact and the application of law in the said complaint, and that he will rather accept a decision without resorting to the subsequent proceedings and [filing] therewith a plan regarding concrete measures to be taken by him in order to eliminate such violation.

Japanese Anti-Monopoly Act, § 53-3. Further proceedings are then aborted, and the Commission enters a Consent Decision. We credit the affidavit testimony of Drs. Matsushita and Ariga to the effect that no negotiation is permitted at this juncture. As with the Recommendation Decision, if a respondent wishes to end the proceedings, he is faced with a "take it or leave it" proposition. Section 53-3, quoted above, requires respondent to admit the allegations of the Complaint and does not permit modification. In fact, in Mrs. Ariga's lengthy experience with the Commission, each Consent Decision has repeated *verbatim*

the allegations of the Complaint, and does not take into consideration any evidence adduced during hearings which may have been held in the interim. As with the Recommendation Decision, the purpose of this requirement is to expedite resolution of the matter.

If no Consent Decision has been entered, the examiner, following the conclusion of the hearings, submits a report, together with the entire record of the case, to the full Commission. This report, which defendants translate as "Draft of Decision," but which plaintiffs translate as "Initial Decision," contains a statement of the facts, evidence, application of the law, and a proposed order. Subsequently, the full Commission reviews the document and, after consideration of the entire record, issues its Decision in the proceedings. The Commission may issue a decision identical to the examiner's report, remand the case to the examiners, initiate its own hearings, or decide to terminate the proceedings.

It should be noted again that the hearing examiner has no authority to issue a decision that is legally binding upon the respondents. Under Sec. 35(2) of the Anti-Monopoly Act, the hearing examiner is expressly precluded from issuing a decision. He does have authority under the accompanying Regulations to submit to the Commission a report of the hearings in the form of a draft of decision, or initial decision, providing the Commission with materials for its consideration in its ultimate decision-making role. The Commission may not rely upon the judgment of the hearing examiner in rendering its decision; rather it must, pursuant to Article 69 of the Regulations under the Act, examine the entire record itself, including all testimony and evidence taken. The Commission then renders its Formal Decision, stating findings of fact and application of the law.

In summary, there are three types of decisions which the Commission may make: a Recommendation Decision based upon the initial informal investigative report; a Consent Decision, based upon the allegations of the Complaint which is in

turn based upon the Recommendation; and a Formal Decision following hearings and submission of a report by the Hearing Examiner. Alternatively, the Commission may issue an Order to Terminate the proceedings.

B. *The JFTC Documents at Issue*

We have before us documents pertaining to two separate cases before the JFTC.[52] For the sake of clarity, we will discuss these cases in chronological order, which will allow us to discuss the simpler case first, although plaintiffs have reversed that order in their document submissions.

1. *The Market Stabilization Case*

In DSS 26, plaintiffs seek to introduce a single document: a Recommendation Decision entered into in JFTC Case No. 5 of 1957, which was brought against the Home Electric Appliance Market Stabilization Council, six of whose members are defendants in this action, *see* n. 5, *supra*, and the National Federation of the Associations of Radio and Electric Appliance Dealers (NFA). The Council was an industry-wide group formed, in plaintiffs' submission, to "stabilize" the domestic market in consumer electronic products by setting and maintaining artifically high prices and by policing the agreements reached by its members. On September 30, 1957, presumably after a preliminary informal investigation, the JFTC served a Recommendation upon the Council and the NFA alleging various violations of the Anti-Monopoly Act and proposing a cease and desist order.

The Council and the NFA decided to accept the Recommendation. Accordingly, only two and one-half weeks after

[52] Documents pertaining to a third JFTC case, the so-called "Six Company Case," *see* p. 1138, *supra*, have also been tendered for admission in this proceeding. While some documents originally offered, such as the "Draft of Decision" (or "Initial Decision"), have since been withdrawn by the plaintiffs, others, primarily notes of testimony and protocols, *see* p. 1138, *supra*, remain in the case and will be considered in a subsequent opinion.

issuance of the Recommendation, on October 17, 1957, a Recommendation Decision was issued. As indicated *supra*, the Recommendation Decision was identical to the Recommendation. It is the Recommendation Decision which plaintiffs seek to introduce in DSS 26. The record contains no information as to the actual investigative steps taken, *i.e.*, what if any of the measures available to the investigators were in fact used. Professor Haley agreed that there was no mandate under the JFTC statute or regulations which required any particular steps to be taken in any particular case. See n. 62, *infra*.

2. *The Matsushita Resale Price Maintenance Case*

DSS 25 consists of a series of documents related to JFTC Case No. 4 of 1967, brought against Matsushita Electric Industrial Co., Ltd. (MEI) charging certain resale price maintenance practices directed towards MEI's Japanese wholesalers. Plaintiffs contend that MEI's supposed resale price maintenance activities were an implementation by that company of all defendants' conspiracy to stabilize the Japanese domestic market at artificially high prices, one of twin foci of plaintiffs' theory of the case. On July 21, 1967, presumably following the initial informal investigatory activities outlined above (there is again nothing in the record regarding the actual investigative steps taken), the JFTC began formal proceedings against MEI by issuing a Recommendation seeking to require the elimination of MEI's alleged resale price maintenance activities (DSS 25-A). The text of the factual recitation and application of the law which accompanied the Commission's Recommendation is set out in the margin.[53] Unlike the Market Stabilization Coun-

[53] Matsushita Electric Industrial Co., Ltd. (hereinafter referred to as "Matsushita Electric") is located at the address listed on this document as the Main Office, and is engaged in manufacturing of home electrical appliances. It ranks first in the business industry in domestic sales of TVs, radios, vacuum cleaners, refrigerators, fans, and heating appliances, as of 1966. Matsushita Electric sells most of its domestic electrical appliances (hereinafter referred to as 'National products') to the wholesalers (hereinafter referred to as 'Agency') who deal mostly in National products.

cil, on August 3, 1967, MEI rejected the Recommendation, outlining its reasoning in an accompanying letter (DSS 25-B & C). Therefore, on August 14, 1967, the JFTC notified MEI that a hearing date had been set and issued a Complaint, labelled "Opening Statement of the Hearing." (DSS 25-D & E).[54] This Complaint was identical to the previously issued Recommendation.[55] MEI denied the primary allegations, setting forth its position in a brief-like "Surrogate's Preparatory Document" (DSS 25-F) dated November 22, 1967, after the commencement of the hearings.

Between September 8, 1967 and May 8, 1969, 28 hearings were held, during which 48 witnesses either testified, submitted statements, or both, and 214 exhibits were introduced. At the conclusion of the hearings, the hearing examiner prepared, pursuant to the procedures outlined *supra*, his initial, or draft, decision (DSS 25-G), recommending a finding that MEI had violated the Anti-Monopoly Law. MEI objected to the Draft, DSS 25-H & I, but ultimately, before the Commission itself acted on the Draft, agreed to entry of a Consent Decision on March 13, 1967 (DSS 25-J). In order to agree to the Consent Decision, it was necessary for MEI to withdraw its statement of objections (DSS 25-K) and submit a proposal for compliance with the Decision (DSS 25-L), and subsequently to report on measures taken pursuant to the Decision (DSS 25-M).

It is noteworthy that, in accordance with the procedures outlined *supra*, the facts recited in the Consent Decision are identical to those in the Complaint; in fact, the Commission, in entering the judgment, merely appended the Complaint in support of the Consent Decision.

C. *The Evidentiary Contentions*

1. *Introduction*

Plaintiffs seek to introduce all of the aforementioned JFTC documents as public records and reports under F.R.E. 803(8)(C); in addition, they contend that the documents constitute admissions of a party, rendering them admissible under Rule 801(d)(2) as well.

Defendants contend that the documents in both cases are analogous to unlitigated consent decrees, and are therefore inadmissible under Rule 408, which excludes evidence adduced in settlement negotiations, or alternatively under Rule 410, which excludes withdrawn guilty pleas, pleas of nolo contendere, and offers to plead guilty or nolo contendere, as well as statements made in plea negotiations. Similarly, defendants argue that the documents are inadmissible under the proviso to § 5(a) of the Clayton Act, 15 U.S.C. § 16(a). Sec. 5(a) gives

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(1) Matsushita Electric has instructed its agencies in order to maintain the retail price of National products at the time of sale of National products, in or around September, 1964, that agencies were not allowed to sell the National products to retailers who sold home electrical appliances at bargain prices and were not to let their retailers engage in transactions with the above. Matsushita Electric has been doing business with agencies only if they follow this practice.

(2) And also Matsushita Electric has instructed its agencies (excluding special agencies) in order to maintain the agencies' selling price of National products at the time of the sale of National products, in or around February, 1965, that the agencies have to sell to their retailers at the wholesale price which the above company provided and that the rebate to their retailers had to be paid on the basis of the standard provided by the above company, and payment of their own rebate is prohibited with regards to most National products, except seasonal products. Matsushita Electric has been doing business with agencies only if they follow this practice. On the basis of each fact of No. 2, Matsushita Electric has been doing business with agencies under conditions which restrict business transactions between the agencies and their retailers.

[54] The document submitted to us as the Complaint, the "Opening Statement of the Hearing" (DSS 25-E) appears to be exactly what it purports to be—the government's opening statement at the hearing. We suspect that the actual Complaint is the document appended to the Consent Decision discussed *infra*, which is labelled "Written Decision to Open the Hearing." Since these documents are in essence identical, and identical to the Recommendation as well, their nomenclature is of no importance here.

[55] We note that the translations provided us differ somewhat in the placement of phrases, and we are of course not qualified to compare the original documents. Nonetheless, it is plain from a study of these documents that they are indeed identical in all pertinent respects.

prima facie evidentiary effect to a previous antitrust judgment against a given defendant in an action brought by the United States when that judgment is introduced in a subsequent private action, but the proviso specifies that the section does not apply to consent judgments or decrees. *See* n. 67 *infra*.

Even if the documents are not excluded under Rule 408 or 410 or § 5(a) of the Clayton Act, defendants argue that they do not constitute admissions, and further, that they are hearsay and not public records within the meaning of the 803(8)(C) exception to the hearsay rule because they are not "findings." While they do not maintain that the JFTC proceedings were untrustworthy in the same way that they argue the Treasury and Tariff Commission proceedings were flawed, defendants do call our attention to a number of factors which might render the JFTC documents untrustworthy under the criteria we have developed in Part II, *supra*. Thus, although there was some confusion at oral argument as to whether a trustworthiness objection was being pressed, *see* transcript, Pretrial Order No. 260 at 228-29, 245, and 250-51, it is clear that the trustworthiness of the JFTC documents as proof of the truth of the statements therein contained is at issue.

Finally, defendants argue that the documents are totally irrelevant to this case, in that they deal solely with an alleged domestic market conspiracy, and that, even if there were some limited probative value, it would be overwhelmingly outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" so as to be excludable under F.R.E. 403.[56]

[56] Defendants also argue that plaintiffs are attempting to utilize this evidence to portray defendants as having a proclivity to conspire—a form of character evidence which defendants maintain would be excludable under F.R.E. 404(b) as constituting "other bad acts." Plaintiffs assure us that they do not offer the evidence to prove character, however, so we need not address the 404(b) arguments. *See* transcript of argument, Pretrial Order No. 261 at 25.

Consistent with the earlier segments of this opinion, we will first address the hearsay question, and then turn to defendants' contentions regarding Rules 408 and 410 and § 5(a) of the Clayton Act, and finally to the other relevancy objections.

2. *The Hearsay Question: Admissibility Under 803(8)(C)*

For the reasons which follow, we hold that the documents of the proceedings before the Japanese Fair Trade Commission are not admissible under the exception for public records and reports. Just like the documents discussed in Parts III and IV, *supra*, these documents are plainly hearsay, and therefore not admissible unless they fall into one of the hearsay exceptions. Again, the only relevant exception appears to be 803(8)(C); and again, defendants argue that the documents are not findings within the meaning of 803(8)(C), and that they are not trustworthy under the principles governing that section.

a. *Findings*

We explained in Part II, *supra*, why the public records and reports that are admissible under 803(8)(C) are limited to "findings," and why other items in the record of an administrative proceeding are not included under that rubric. The only documents before us which are even arguably findings are the Recommendation Decision in the Market Stabilization Council case, DSS 26, and, with respect to the resale price maintenance case against MEI, the Recommendation, DSS 25-A, the Opening Statement of the Hearing, or Complaint, DSS 25-E,[57] the Initial Decision (or Draft of Decision), DSS 26-G; and the Consent Decision, DSS 25-L.[58] We discussed in both Parts II and III the problem of defining a finding for purposes of

[57] *See* note 54, *supra*.

[58] The remaining documents in DSS 25, *see* p. 1177, *supra*, because they cannot be construed as findings and therefore cannot come in as public records under the 803(8)(A) exception to the hearsay rule, are plainly inadmissible hearsay.

803(8)(C) when a document represents a step in a process which is subject to further review, and concluded that generally it was preferable to treat it as a finding subject to review in terms of the trustworthiness criteria which we have developed.

The factual recitation set forth in the Recommendation Decision in the Market Stabilization Council case, DSS-26, was based entirely upon the initial informal investigation of the Commission's staff. The affidavits make plain that the Commission makes no review of the evidence at this stage of the proceedings. No hearings were held. The text of the Recommendation prepared by the investigative staff automatically became the text of the Recommendation Decision, as required by Sec. 48(4) of the Anti-Monopoly Law.[59] Moreover, a number of decisions by the Japanese Supreme Court state that the Recommendation Decision does not conclusively determine the existence of a violation, that a formal finding by the Commission that a violation exists is not a prerequisite for a Recommendation Decision, and that whether or not violations did in fact exist does not affect whether or not the Recommendation Decision is appropriate. *See, e.g., Idemitsu Kosan K.K.* v. *Kosei Torihiki I'Inkai*, 32 Minshu 515 (April 4, 1978)(Supreme Court of Japan, 3d P.B.).[60] Furthermore, the Japanese Supreme Court decisions make plain that a Recommendation Decision in no way constitutes formal findings of fact by the

[59] There was some dispute as to whether this section is permissive or mandatory. We accept the position set forth in Dr. Ariga's June 15, 1980 affidavit, in which she states that not only is the statute mandatory, but in her experience Recommendation Decisions are always identical to the Recommendation.

[60] Translations of seven Japanese cases were provided us by the parties. The Japanese cases do not say, as defendants maintain they do, that Recommendation Decisions have no evidentiary weight whatsoever. They merely state they are not conclusive. Whether a Recommendation Decision would be admissible in a subsequent Japanese proceeding is irrelevant, for we are concerned here only with admissibility under U.S. law. The Japanese cases are helpful, however, to an understanding of the weight accorded such decrees, as well as to a general understanding of JFTC procedures.

Commission. At most, the document represents factual findings of the staff, and not of the Commission.[61]

As we have observed in Part II, however, we agree with plaintiffs that 803(8)(C) findings need not be limited to those of the formal body, but that staff findings, "resulting from an investigation made pursuant to authority granted by law," may also be included. *Cf. United States* v. *Corr*, 543 F.2d 1042, 1051 (2nd Cir. 1976). Therefore, consistent with the approach outlined in Part II, we will examine the "findings" according to the trustworthiness criteria we have developed *supra*.

b. *Trustworthiness*

With respect to the Advisory Committee's four criteria, we have no reason to question the timeliness of the investigation or the skill and experience of the staff members involved. However, as to the third criterion, no hearing was held. Moreover, serious questions of motivation, the fourth criterion, arise from the fact that the factual "findings" of the Recommendation, which are copied verbatim without review into the Recommendation Decision, are the precursor to the charging document which initiates the prosecution, much as the facts gathered in a grand jury investigation are those resulting in an indictment. The factual findings in both cases are then memorialized in documents whose purpose is not to "find" facts but to accuse. Additionally, the administrative or judicial process which these documents initiate is predicated upon the notion that these accusatory findings are preliminary and likely to be

[61] Plaintiffs rely heavily upon the contention that § 48 of the Anti-Monopoly Act and § 20 of the Regulations, both of which apply to Recommendations, use the words "find" or "finding." While it is true that the translation of the Japanese word at issue, "mitomeru," is to "recognize" or "acknowledge," both of these renditions connote something quite different from "find." Furthermore, as we have noted previously, even if "find" were the only possible translation, such language would not have talismanic significance in those proceedings.

revised in the *de novo* proceedings to follow. In this latter regard, we note that: (1) the "findings" are made at the earliest possible stage of the proceedings, at which the respondent has enjoyed few procedural rights; (2) the "findings" are based upon an informal investigation in which hearsay and ex parte information play a substantial and apparently dominant role; and (3) there is no record of the proceedings.[62]

We find that the preliminary investigation leading up to a Recommendation, *after* which formal proceedings are to commence, is simply too preliminary to be trustworthy within the meaning of 803(8)(C), and that the document relied upon as the distillation of the investigation, because it is accusatory in nature, cannot be deemed a trustworthy finding. The fact that the Commission converts the Recommendation into a Recommendation Decision following acceptance by the respondent does not alter the analysis, for it has been thoroughly documented that the Recommendation Decision does not constitute fact-finding by the Commission. *See* p. 1179, *supra*.

If the Recommendation Decision in the Market Stabilization Council case is not trustworthy enough to be admissible, then neither is the Recommendation in the MEI case. The Complaint in the MEI case is identical to the Recommendation, was in fact copied directly from the Recommendation without additional review, and therefore suffers from exactly the same weaknesses. While based upon staff findings, it is nonetheless an accusatory document, and given its etiology, is still too preliminary in nature to be 803(8)(C) material.

[62] Plaintiffs make much of the formal procedural mechanisms set forth in the Anti-Monopoly Law and its Regulations, asserting that the procedural regularity and thoroughness of the investigation render it trustworthy. However, as suggested in note 50, *supra*, Professor Haley had no knowledge as to what investigators actually did; his testimony made clear that he relied solely on the statute as written and that his testimony as to actual operations was entirely speculative. In addition, he agreed that the investigatory powers and procedures set forth in the Act are not necessarily exercised in any given case. *See* Pretrial Order No. 264 at 47-48. Moreover, the procedural regularity of the proceedings has no bearing on our holding that the investigation is too preliminary to be trustworthy.

The Consent Decision is also identical to the Complaint. As is discussed in detail in connection with our analysis under Rule 410, *infra*, the Consent Decision does not take into account any evidence adduced during the hearings. Rather, the respondent must consent to entry of a decision based solely upon the allegations of the Complaint, as required by Sec. 53(3) of the Anti-Monopoly Law; negotiation is not permitted. *See* p. 1176, *supra*. Thus, the fact that the decision was entered after hearings were held is irrelevant to the analysis, for the "facts found" are identical to and are rooted in the preliminary facts set forth in the Complaint. Therefore, the Consent Decision too is inadmissible.

The Draft of Decision is the only document which includes facts found after hearings, based upon evidence adduced at the hearing. We need not extend this very long opinion by explaining its status within the meaning of 803(8)(C), given its ultimate reviewability by the Commission itself, for the Draft Decision was superseded in this case by the Consent Decision. Consistent with the conclusions set forth in Part II, we do not believe that Rule 803(8)(C) contemplates receipt in evidence of what is essentially a staff report which has no legal effect because of the subsequent entry of the Consent Decision.

Thus, we find that defendants have met their burden of showing that the documents offered in DSS #s 25 and 26 are untrustworthy. Accordingly the documents do not meet the requirements of Rule 803(8)(C) and constitute inadmissible hearsay.

3. *F.R.E. 408, 410, and § 5(a) of the Clayton Act*

F.R.E. 408 excludes from evidence matters pertaining to settlement negotiations and agreements;[63] F.R.E. 410 ex-

[63] Rule 408 reads:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements

cludes from evidence withdrawn pleas of guilty, pleas of nolo contendere, and offers to plead guilty or nolo contendere, as well as statements made during plea negotiations.[64] Defendants maintain that both the Recommendation Decision entered into in the Market Stabilization case and the Consent Decision in the case against MEI are consent agreements which are analogous to nolo contendere pleas, and are therefore inadmissible under Rule 410. We agree.

It is well-established that unlitigated consent decrees are equivalent to pleas of nolo contendere. *See, e.g., Lipsky* v. *Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2nd Cir. 1976); *City of Burbank* v. *General Electric Co.*, 329 F.2d 825, 833-34 (9th Cir. 1964); *Simco Sales Service Inc.* v. *Air Reduction Co.*, 213 F.Supp. 505 (E.D.Pa. 1963).[65] Because such con-

> made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such a proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The argument under Rule 408 has not been pressed by defendants, nor has it been briefed. Because Rules 408 and 410 are based on similar policies, namely, encouraging expeditious settlement of disputed cases, and because the case at bar fits more neatly into Rule 410, we will address it primarily in the Rule 410 context.

[64] F.R.E. 410 provides in full:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

[65] The Second Circuit explained, for example that:

> Nolo pleas have been equated with "consent decrees" for purposes of the proviso to § 5(a) of the Clayton Act. . . . The reason for this equivalence is that both consent decrees and pleas of nolo contendere are not

sent decrees are not decisions on the merits, they are not admissible to prove that any violation occurred. *See Beatrice Foods Co.* v. *F.T.C.*, 540 F.2d 303 (7th Cir. 1976). Therefore, if the Japanese decisions at issue are analogous to an American consent decree, they are clearly inadmissible.

In the Market Stabilization Council case, the Council accepted the original JFTC Recommendation. As discussed above, that Recommendation was not based on formal fact finding by the Commission, but was in the nature of a preliminary accusatorial document. No hearings were held. The text of the Recommendation automatically became the text of the Recommendation Decision, as required by Sec. 48(4) of the Anti-Monopoly Law. The policy of Sec. 48 is to promote compliance with the Anti-Monopoly Law by encouraging respondents to consent expeditiously to a Recommendation, thereby achieving the elimination of certain practices without the expense of litigating their legality. That is the identical policy underlying both Rules 408 and 410.

Our conclusion that the Recommendation Decision is analogous to a consent decree, hence a *nolo* plea and inadmissible under Rule 410, is reinforced by the decisions of the Japanese Supreme Court discussed at p. 1179, *supra*, all of which state that the Recommendation Decision does not conclusively determine the existence of a violation and that whether or not violations did in fact exist does not affect whether or not the Recommendation Decision is appropriate.

The Consent Decision in the resale price maintenance case against MEI presents a more difficult problem, but we nevertheless reach the same conclusion. The Consent Decision was entered at a later stage of the proceedings, after hearings, and after preparation of a draft of decision, or initial decision, by

> true adjudications of the underlying issues; a prior judgment can only be introduced in a later trial for collateral estoppel purposes if the issues sought to be precluded were actually adjudicated in the prior trial.

Lipsky v. *Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2nd Cir. 1976) (citations and footnote omitted).

the hearing examiner, but before final action by the Commission. Furthermore, Sec. 53(3) of the Anti-Monopoly Law, quoted at p. 1180, *supra*, requires that a respondent submit "a written statement setting forth that he admits the findings of fact and the application of law." Thus plaintiffs contend the Consent Decree is more in the nature of a guilty plea, which might well be admissible as an admission under Rules 801(d)(2) and 804(b)(3). *See 2 Weinstein on Evidence*, ¶ 410[05], at 410-31.

However, as we explained *supra*, a respondent who decides to enter into a Consent Decision is no more able to negotiate with the Commission than if he were agreeing to a Recommendation Decision. It has been persuasively demonstrated in the affidavits of Drs. Matsushita and Ariga that a Consent Decision merely repeats verbatim the allegations of the Complaint and bears no relationship whatever to evidence adduced during the hearings. The admission is for the purpose of terminating the proceedings and does not necessarily imply that the respondent verifies that the facts alleged in the Complaint are indeed true. Rather, if a respondent wishes for any reason whatever to terminate the proceedings once they have begun,[66] his only route is to request entry of a Consent Decision by way of the legal fiction of admitting the facts as they are set forth in the Complaint. The Commission does not make a detailed analysis of the information gathered by the investigative staff; rather, the Consent Decision is prepared in a rote, mechanical manner, copied from the Complaint. There is thus no adjudication of the facts at issue.

What we have here is a sort of hybrid unknown in American law-not exactly a *nolo* plea; not exactly a guilty plea, for this is a civil action; and not exactly a settlement agreement as con-

[66] Possible motivations for submitting to a consent decision are easily imaginable. In this case, MEI maintains that it was being economically harmed by a consumer boycott which was instigated because of publicity over the JFTC action against it, and that it quite plausibly consented to entry of the Consent Decree in order to deflect public attention and thwart the boycott.

templated by Rule 408, for there can be no compromise or negotiation. Plaintiffs suggest, then, that this hybrid "falls between the cracks" of the exclusionary Rules, and therefore is admissible as an admission under 801(d)(2). While this argument has appeal, we must ultimately disagree. Against the background of Japanese law, we find instead that this document is akin to an American consent agreement, and, therefore, inadmissible under Rule 410 on the same basis as is the Recommendation Decision.

The policies which underlie Rules 408 and 410, as well as Section 5(a) of the Clayton Act,[67] are clear and support the

[67] Section 5(a) of the Clayton Act, 15 U.S.C. § 16, reads:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

Plaintiffs suggest that because this section was enacted to aid the private plaintiff by freeing him from the requirement of relitigating an already litigated violation, the section cannot be applied to exclude evidence. The section has, however, been consistently construed to exclude evidence of both consent decrees and pleas of nolo contendere. *See, e.g., City of Burbank* v. *General Electric Corp.*, 329 F.2d 825 (9th Cir. 1964); *Commonwealth Edison* v. *Allis-Chalmers Mfg. Co.*, 323 F.2d 412, 415 (7th Cir. 1963), *cert. denied*, 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659 (1964); *D[illegible]ld Co.* v. *Westinghouse Elec. Corp.*, 252 F.Supp. 939, 941 (S.D.N.Y. [illegible]6); *Simco Sales Service, Inc.* v. *Air Reduction Co.*, 213 F.Supp. 505 (E.D.Pa. 1963). *Cf., Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 n. 12 (3rd Cir. 1973).

In essence, the proviso to section 5(a) makes it clear that section 5(a) is not to be read to change the common law principle that consent agreements are inadmissible. Thus, in the antitrust context, it presages Rule 410, which, since pleas of nolo contendere have been equated with consent agreements, essentially duplicates 5(a) for all federal actions.

We need not discuss 5(a) in detail, for it applies only to previous actions brought by the United States under American law. Nonetheless, its underly-

result we have reached. First, these policies encourage expeditious settlement of disputed claims. But more important, once that initial policy is articulated, the fundamental nature of the consent agreement process makes the agreement untrustworthy as an indicator of the truth. *See* Advisory Committee Notes to Rules 408 and 410. This final factor is influential and persuades us that the Consent Decision here should not be admitted, for it is plain from the affidavits we have considered that, despite the language of the Japanese statute, a respondent does not, by "admitting" the fact and thereby agreeing to entry of a Consent Decision, verify that the facts are indeed true. While the Japanese Supreme Court has apparently not addressed the meaning of such an "admission," for the cases with which we have been provided deal only with Recommendation Decisions, the Commission, as explained by Professor Ariga, does not view the underlying facts as proved. Moreover, Professor Haley conceded that a Consent Decision should be accorded the same weight as a Recommendation Decision. Pretrial Order No. 264 at 98. Thus, unlike the situation where there has been a guilty plea, there has been no adjudication on the merits.[68] In sum, we find the Consent

ing policies—the same as those underlying Rules 408 and 410, *see supra*,—are relevant to this action. We therefore need not discuss whether the proviso is inapplicable to the MEI case because of its restriction to "decrees entered before any testimony has been taken." In addition, we note only that the MEI Consent Decision, entered after testimony was taken, is distinguishable from the normal situation under U.S. law, in that the Consent Decision does not in any way take into consideration evidence adduced at the hearings.

[68] We have addressed in this section only the actual decisions tendered by plaintiffs. The additional documents submitted under DSS 25 relating to the resale price maintenance case cannot fairly be called consent agreements. The Recommendation, the Opening Statement of the Hearing, and the Initial Decision were all disposed of *supra* on hearsay grounds. Plaintiffs argue that those of the documents in DSS 25, see pp. 1177-1178, *supra*, which originated with Matsushita are admissions and therefore admissible independently under 801(d)(2). We disagree, for we view these documents as essential steps to the Consent Decision, so inextricably intertwined as to be logically inseparable.

Decision to be analogous to an American consent decree, and inadmissible under F.R.E. 410 to prove the fact of the violations recited therein.

4. *Other Relevancy Objections*

Defendants contend that the JFTC materials are also easily disposed of on conventional (F.R.E. 402) relevancy grounds. That contention, however, embroils us in one of the primary disputed legal issues in this case, *i.e.*, whether a home market price fixing conspiracy in Japan, if it existed, is relevant to the existence of an export conspiracy. Plaintiffs have posited a single, unitary, long-lasting conspiracy which they urge may not be fragmented for analytic purposes; defendants counter that nothing they may have done in Japan has any bearing whatever on activities in the U.S. market, and that in any event there is no evidence of any violation subsequent to the 1957 Market Stabilization Council case, or in the case of MEI, subsequent to the 1967 case. We do not see this as a question of the law of evidence, but of the substantive law of antitrust conspiracy. Accordingly, we will address this question when we take up the defendants' motion for summary judgment addressed to the conspiracy claims.[69]

Without determining the probative weight to be given the JFTC materials, we are equally unable to strike the balance required to make a determination under the last ground of defendants' objection to the JFTC proceedings, Rule 403. We note, however, that the possibility of unfair prejudice from use of these materials is enormous. The same factors which led to our determination that the decisions at issue are in actuality consent agreements and untrustworthy as evidence of the fact of any actual violation suggests that a jury could be easily misled. Furthermore, we note that if the evidence were to be admitted, defendants would inevitably bring in considerable

[69] Moreover, if the evidence were to be deemed relevant, it would be necessary to decide which parties it would be admissible against. This too is a matter for consideration in conjunction with the conspiracy motion.

testimony and exhibits to explain, or in essence relitigate, the issues in dispute before the JFTC. We express no view at this time, however, as to the ultimate weight to be accorded these factors.

VI. *Admissibility of Judge Higginbotham's Findings of Fact*

On January 2, 1975, eight defendants in the Zenith case and three defendants in the NUE case filed identical motions to dismiss based upon (1) lack of personal jurisdiction; (2) improper venue; and (3) insufficient service of process.[70] The issues raised by defendants' motions were briefed extensively by the parties, and an extensive record was compiled. In addition, the moving defendants responded to interrogatories propounded by the court for the purpose of eliciting additional facts relevant to the matters placed in issue by those defendants. Following four days of oral argument, Judge Higginbotham, see n. 6 *supra*, filed an opinion in which he concluded that "this Court may exercise jurisdiction over each of the moving defendants, that venue is proper for each of them in this district, and that each of them has been adequately served with process." *Zenith Radio Corporation* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 262, 267 (E.D.Pa.1975). In reaching his decision, Judge Higginbotham made extensive findings of fact based upon:

> (1) defendants' answers to the Court's interrogatories in the Zenith and NUE actions; (2) those of plaintiff's proposed findings of fact in the NUE action that are reasonably supported by the evidence; and (3) other factual submissions of the plaintiffs that are relevant to the issues raised by the moving defendants.

Id. at 268 (footnote omitted).

[70] In the Zenith case, the moving parties were Matsushita Electric Industrial Co., Ltd. (MEI), Matsushita Electronics Corporation (MEC), Matsushita Electric Trading Co., Ltd. (MET), Sharp Corporation (SHARP), Hitachi, Ltd. (HITACHI), Mitsubishi Electric Corporation (MELCO), and Sanyo Electric Co., Ltd. (DENKI). KADEN, MELCO and DENKI were the movants in the NUE case.

Plaintiffs contend that Judge Higginbotham's findings represent the "law of the case" and that defendants are thus precluded from relitigating these findings in connection with the summary judgment motions or at trial; they argue further that the findings are admissible now and at trial for all purposes under F.R.E. 803(8)(C). We shall not dwell upon the "law of the case" point, for it is clear beyond cavil that Judge Higginbotham's findings, which were addressed to the preliminary motion to dismiss, are not "the law of the case" as to any legal issues beyond personal jurisdiction and venue[71] and do not control the issues now before us and upcoming in connection with the motions for summary judgment. We shall, however, address, albeit briefly, plaintiffs' contentions that Judge Higginbotham's findings are somehow admissible as a public record or report. This contention is plainly incorrect for the following reasons.

First, a reading of the text of § 803(8)(C) makes it plain that the drafters were not talking about judicial findings; rather, the rule speaks of factual findings resulting from "an investigation made pursuant to authority granted by law." Surely, Judge Higginbotham was not engaged in that pursuit. Second, a review of the advisory committee note makes it clear that judicial findings are not encompassed; not only is there not the remotest reference to judicial findings, but there is a specific focus on the findings of officials and agencies within the executive branch.

Our conclusion, however, does not rest solely upon the text of § 803(8)(C) and its legislative history. Additionally, we find that the construction opted for by plaintiffs would create a conflict with other sections of the F.R.E. Accordingly, a third

[71] The "law of the case" doctrine operates to call a halt to attempted relitigation of issues once they have been decided. *See, e.g.*, *White* v. *Murtha*, 377 F.2d 428 (5th Cir. 1967); *Swietlowich* v. *County of Bucks*, 610 F.2d 1157 (3rd Cir. 1979). The authorities are clear that it is legal issues which cannot be readdressed; preliminary factual findings made for one purpose are plainly not the law of the case with respect to issues of substantive liability.

basis for our rejection of plaintiffs' position is that the trustworthiness evaluation which we have discussed at length *supra* would be totally unsuited to evaluating judicial findings. Indeed, such evaluation might well conflict with Rule 605, which makes the judge incompetent as a witness. This result follows because the process of determining trustworthiness, either *in limine* or by way of defense at trial (if a preliminary determination of trustworthiness were made), cognizes the possibility of calling the author of the fact-finding, or his staff members, as witnesses so as to impeach their work. That just cannot be done under the F.R.E. with respect to a judge.

Another conflict, and the fourth reason for our rejection of plaintiffs' argument is that where the drafters wished to make judicially found facts admissible, they did so expressly. *See* Rule 803(22) pertaining to judgments of previous conviction and Rule 803(23) pertaining to judgments as to personal, family, or general history, or boundaries.[72] The drafters did not so provide with respect to other judicial findings or judgments. Finally, even if Judge Higginbotham's findings were otherwise admissible, they would have to be excluded under Rule 403. This is because such findings would present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice. There would also be a prospect of confusing the issues and causing undue delay because of the time necessary to explain to the jury that the

[72] F.R.E. 803(22) excepts from the hearsay rule:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Similarly, 803(23) excepts:

> Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

findings were made only as they relate to the preliminary matters of personal jurisdiction, venue, and service of process, all of which, of course, implicate different legal issues than are involved at trial. This would in turn require a veritable exegesis of abstruse areas of the law.

VII. *Materials from the Organization for Economic Cooperation and Development and the United Nations*

A. *Introduction*

The last two documents with whose admissibility we are here concerned are contained in DSS #s 46 and 47. DSS #s 46 consists of an excerpt from a report of the Organization for Economic Cooperation and Development (OECD) prepared in 1968 and entitled "Electronic Components—Gaps in Technology." The excerpt sought to be introduced is a part of a section of the report captioned "The Main Inventions and New Technologies in the Industry" and includes a discussion and data indicating that most technological advances in the post World War II semiconductor industry were made by American firms. DSS #47 is a table taken from a publication of the Statistical Office of the United Nations entitled *The Growth of World Industry, 1967 Edition, Volume II, Commodity Production Data*, 1953-1966 (1968). The table sets forth television production figures of member countries for the years 1953-1966.

Admission is sought primarily under 803(8)(A) and/or (B), although presumably at least the narrative portions of the OECD report are the sort of material covered by 803(8)(C). Although the parties have agreed (for 803(8) purposes) on the admissibility of many statistical documents, defendants have objected to DSS #s 46 and 47 primarily on the ground that they are not the product of "public offices or agencies" within the meaning of 803(8). They also raise trustworthiness objections.

The organization for Economic Cooperation and Development is an international organization made up of nation

states.[73] It was established by convention and protocols signed in Paris in December, 1960. The convention was ratified by President Kennedy in March, 1961, with the advice and consent of the United States Senate. It was entered into force in September, 1961, and proclaimed by the President in November, 1961. Its purpose is to "promote the highest sustainable growth [of the economies of member countries] and improve the economic and social well-being of their peoples," through economic cooperation. 12 U.S.T. 1728, 1731, T.I.A.S. 4801. To this end, the organization may make decisions that are binding on all its members, make recommendations to its members, and enter into agreements with members, non-member states, and international organizations. 12 U.S.T. at 1734.

The report at issue here was presented for information at the Third Ministerial Meeting on Science of OECD countries, held in March, 1968. It was prepared by a group of experts nominated by the countries that wished to participate in the work of the sector concerned and by experts from universities and industry.

A questionnaire was prepared and sent to each of the participating countries, and the experts collected and coordinated national replies. The data submitted by member countries were supplemented by visits to firms, discussions with experts, and analysis of available statistical data by the OECD Secretariat. On the basis of this information, the Secretariat prepared a first draft of a report, which was discussed and ultimately agreed to by the experts.

The Statistical Office of the United Nations is a part of the U.N.'s Department of International Economic and Social Affairs and is granted authority to compile statistical data by

[73] At present member countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, The Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Kingdom, and the United States. Yugoslavia participates with special status.

the Statistical Commission of the U.N.'s Economic and Social Council. The Statistical Office compiled the data set forth in *The Growth of World Industry, Volume II*, pursuant to Resolution 7-XV, ¶ 2 (1968) of the Statistical Commission, which provides for the compilation and publication of international comparable industrial data, including industrial commodity production statistics on a selected basis.

B. *Are the OECD and the United Nations Public Offices or Agencies Under 803(8)*

Prior to the enactment of the F.R.E., admission of official records in federal litigation was governed by 28 U.S.C. § 1733(a), which provided:

> Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

Records of nonfederal agencies (including those of state and foreign governments) were not admissible under this section. Rule 803(8) is thus broader in scope since, as the Advisory Committee noted, it "makes no distinction between federal and nonfederal offices and agencies."

As we observed *supra* n.11, it is clear that 803(8) permits admission of records that are the products of foreign governmental agencies. Whether the rule also permits introduction of reports of supragovernmental agencies is a different question, however, and is apparently one of first impression.

Citing *Reparation for Injuries Suffered in Service of the United Nations* (1949) I.C.J. 174, 178-79, plaintiffs have argued that under international law both the U.N. and the OECD are legal personalities and thus may be deemed public offices or agencies. They note that the United Nations Charter and the Convention and Protocols for the OECD have been accepted by the governments of both Japan and the United States. For their part, defendants interpret the phrase "public offices or agencies" as meaning offices or agencies of a "duly

constituted governmental body." While nothing in the Advisory Committee Note to 803(8) can fairly be said to address this issue, we see nothing in the language of 803(8) and no hint in the Advisory Committee Note to indicate that the phrase "public offices or agencies" is thus delimited or that a "duly constituted governmental body" cannot include an international governmental body such as the United Nations or a supranational agency such as the OECD. Rather, given the background of their creation, the breadth and regularity of their public business, and the solemnity of their duties, we see treatment of the U.N. and OECD as public offices or agencies as consistent with the theory and raison d'etre of 803(8)—the notion that circumstantial guarantees of trustworthiness are provided by the presumption that governmental reports are reliable or probably reliable. *See* Saltzburg and Redden, *Federal Rules of Evidence Manual*, (2d Ed. 1977) at 32.

In sum, in the absence of authority to the contrary, we are satisfied that both the United Nations and the OECD qualify as public offices or agencies within the meaning of 803(8). Since there has been no question raised as to whether these materials set forth "the activities of the office or agency," 803(8)(A), "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," 803(8)(B) or "factual findings resulting from an investigation . . ." 803(8)(C), we turn to the trustworthiness objection raised by defendants.

C. *Trustworthiness*

As we indicated *supra* at 1145, 803(8) presumes admissibility of public records and reports in the first instance, and the burden is on the party opposing admission to rebut the presumption of trustworthiness. As to the report of the OECD, defendants argue that there is insufficient evidence of the source of the data. In response, plaintiffs note that the data was compiled by a panel of experts who, while not identified in these materials, represented a number of countries and who discussed and agreed to the final report. There is no reason to suspect, and defendants have not presumed to suggest, any motivational problems on the part of these experts.

As to the data compilation prepared by the Statistical Office of the United Nations, defendants object that the report does not indicate that "the source of the data was ever confirmed." While we are not altogether sure what is meant by this statement, we believe that as it stands it is insufficient to impugn the sources of the information and thus the presumed trustworthiness of the document.

Relatively little time was devoted to these documents, at least in comparison to the matters discussed earlier in this opinion, and defendants did not martial much in the way of objection. While we cannot be sure what would emerge from more searching scrutiny, we conclude that as to these two documents, defendants have failed to show that "the sources of information or other circumstances indicate lack of trustworthiness." Thus, DSS #s 46 and 47 are admissible as 803(8) exceptions to the rule against hearsay.

VIII. *Conclusion*

This opinion has analyzed in great detail, through a series of evidentiary layers, the documents contained in DSS #s 1-26, as well as Judge Higginbotham's 1975 findings and certain miscellaneous documents containing statistical data. For the reasons set forth, we find admissible only the documents described in Part VII, *supra*, and will exclude the others from consideration in connection with the motions for summary judgment on plaintiffs' conspiracy and other affirmative claims, and in connection with our preliminary (Rule 104) determination as to whether plaintiffs have come forward with sufficient independent evidence of the existence of the conspiracy they have charged among the defendants to go forward with those conspiracy claims.

Had this been an ordinary case, it would have been unnecessary for us to have approached the problems presented through so many evidentiary layers. It would have been enough, for example, to exclude the evidence had we found it to be hearsay and not subject to the 803(8)(C) exception, without considering the other grounds of objection. We have addressed

all potential evidentiary questions for two reasons. First, given the magnitude of the case and its history to date, there is a certainty of appellate review, and we think it important to "touch all bases" and analyze the issues from every relevant direction for the ultimate benefit of the parties and the Court of Appeals and so that there can be no remand because of a failure to address particular questions. Second, and of more immediate applicaton, it is necessary that all evidentiary objections be decided because of the impact on the case of F.R.E. 703.

As will appear in bold relief when we write about the admissibility of plaintiffs' opinion evidence, a subject we will address in the third opinion in this evidentiary series, (the second opinion will deal with all the items listed at 1137-1139, *supra*, and not considered herein), Rule 703 provides that the facts or data upon which an expert bases an opinion or inference need not be admissible in evidence so long as they are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." We dwelt extensively upon the expert opinions during the course of our evidentiary hearings and have read the expert reports and can thus state that many of the matters we have excluded and many matters which will be excluded in our next opinion are relied upon heavily in the reports of plaintiffs' experts. Plaintiffs announced during the hearings that they believe that the experts may properly rely on the excluded material, citing Rule 703. Thus the *basis* on which the evidence was excluded becomes extremely important. For instance, if a document was excluded for some technical reason, perhaps the expert may still rely upon it if Rule 703 is otherwise met. If, however, it was excluded because it was untrustworthy, perhaps he may not. As we have ofttimes observed during the course of these hearings, where the point was demonstrated again and again, the F.R.E. are a veritable "seamless web."

Because our rulings are all subsumed within the foregoing opinion, a separate Pretrial Order is unnecessary; this opinion will constitute P.T.O. No. 283.

APPENDIX
DOCUMENTARY SUBMISSION SHEET[1]

Date: ______

I. DOCUMENT IDENTIFICATION

A. **PARTY OFFERING EVIDENCE:** ____________

B. **DOCUMENT IDENTIFICATION:**

1. Document Number: ____________
2. Brief Description: ____________
3. FPS Reference(s)[2]: ____________
4. Description of Documents of a Similar Type[3]: ____________

C. **PARTY(S) AGAINST WHOM OFFERED:** ____________

II. OBJECTOR POSITION

Date: ______

Identify Objector: ____________

☐ No Objection.

Objections: Reasons.

☐ Lack Authenticity (F.R.E. 901): ____________

☐ Not Business Record (F.R.E. 803(6)): ____________

☐ Not Public Record or Report (F.R.E. 803(8)): ____________

☐ Other Hearsay (F.R.E. 802): ____________

☐ Lacks Trustworthiness: ______________________

____

☐ Irrelevant (F.R.E. 402): ____________________

____

☐ Other: ______________________________________

____

____

III. PROPONENTS' REPLY

Date: _____

Rejoinder: Reason.

☐ Authentic (F.R.E. 901): _____________________

____

☐ Authentic (F.R.E. 902): _____________________

____

☐ Admission (F.R.E. 801(d)(2)): _______________

____

☐ Business Record (F.R.E. 803(6)): ____________

____

☐ Other Hearsay Exception: ____________________

____

☐ Trustworthy: ________________________________

____

☐ Relevant: ___________________________________

____

☐ Other: ______________________________________

____

1. See Documentary Submission Instructions.
2. Multiple references to be listed on separate attached sheet.
3. Documents of a similar type, such as invoices, purchase orders, etc., may be submitted with a single DSS.

ZENITH RADIO CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Sept. 29, 1980.

Blank, Rome, Comisky & McCauley by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corporation and National Union Electric Corporation, plaintiffs.

Philip J. Curtis, John Borst, Jr., Glenview, Ill., for Zenith Radio Corporation, plaintiff.

Mudge, Rose, Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New

York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Arnold B. Calmann, Newark, N.J., Baker & McKenzie by Hoken S. Seki, Thomas E. Johnson, Chicago, Ill., for Mitsubishi Electric Corporation and Melco Sales, Inc.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Harry M. Davidow, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadelphia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwarz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. Mock, Jr.; Tanaka, Walders & Ritger by Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia, Pa., for Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, Dechert, Price & Rhoads, Philadelphia, Pa., for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, James S. Morris, Kevin R. Keating, Michael S. Press, New York City, Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., Sanyo Elec. Trading Co., Ltd., and Sanyo Manufacturing Corporation, defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION

(Admissibility of Materials Relating to Activities in Japan)

Pretrial Order No. 295

EDWARD R. BECKER, District Judge.

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I. *Preliminary Statement*

This is the second in a series of opinions which will address the myriad issues raised during the course of a lengthy pretrial evidentiary hearing in this complex antitrust case. The anatomy and scope of the case has been described in our opinion on subject matter jurisdiction, filed April 14, 1980, 494 F.Supp. 1161. The nature and scope of the evidentiary hearing has been described in the first opinion in the current series, filed on August 7, 1980, 505 F.Supp. 1125.[1] This opinion will consider admissibility of three major groups of documents: (1) materials seized by the Japanese Fair Trade Commission (JFTC) in "raids" on the offices of several of the defendants here who were respondents in the so-called "Six Company Case";[2] (2)

[1] That opinion deals with the admissibility of various public records and reports and is cited hereafter as "Public Records Opinion."

[2] *See generally* Public Records Opinion at 88-94 (describing Japanese Antimonopoly Law and JFTC procedures). The "Six-Company Case," Case No. 6 of 1966, was brought against six respondents, all of which are defendants in this case: Sanyo Electric Co., Ltd.; Tokyo Shibaura Electric Co., Ltd. (now known outside Japan as Toshiba Corporation); Hayakawa Electric Co., Ltd. (now known as Sharp Corporation); Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd. ("MEI"); and Mitsubishi Electric Corporation ("MELCO" or "Melco"). The "raids" mentioned in the text occurred in November 1966, during the JFTC investigation and are conceded by the parties to have been legal under Japanese law. On December 14, 1966, the JFTC charged the six respondents with violations of the Japanese Antimonopoly law by issuing a document called a "recommendation," which bears the legend "No. 17 of

testimony and statements or "protocols" given by officials of the respondent companies during the course of the JFTC proceedings in the "Six Company Case"; and (3) materials produced in discovery from the files of the Japanese defendants and others relating to activities in Japan of Japanese manufacturers of consumer electronic products or of associations of manufacturers. There were virtually no documents in these categories whose admissibility was agreed upon, and all of the documents were the subject of heated dispute about their admissibility.

In the course of the pretrial evidentiary hearing, we also considered the admissibility of a host of materials produced in discovery from the files of defendants and of American pur-

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1966." The six companies were charged with holding meetings known as the Tenth Day Group and the Palace Group, at which they allegedly agreed on retail list prices, retail and wholesale profit margins, and rebates in connection with the sale of television receivers in the domestic Japanese market. The JFTC held a total of 39 hearings in the case between January 31, 1967, and June 7, 1969. On June 9, 1970, the hearing examiners issued a "Draft of Decision" in which they found that the respondents had engaged in the violations charged, but that the violations ceased in 1967. The JFTC did not adopt this Draft of Decision, however. On July 27, 1978, JFTC entered an Order to Terminate dismissing the case, which stated:

> Whereas, examining the draft of decision on the basis of the case records as well as the statements of objection, etc., although it may be noted that the respondents had discussed together the retail cash list prices and wholesalers' and retailers' margin rates of color television sets and black-and-white television sets, this Commission has not been able to reach a conclusion up to the present because of the factual and legal problems involved in this case.
>
> Moreover, as the acts which are the subject matter of the hearing proceedings ended in January of 1967, thus already showing a lapse of more than ten years, the factual background cannot be expected to be further clarified even if the hearing proceedings were reopened at this time while, in addition, from the point of view of maintaining order in competition, the practical benefit of continuing the hearing proceedings has now been lost. Moreover, any further prolonging of the disposition of this case is also considered to be undesirable from the point of view of legal stability.

The plaintiffs offer in this case evidence from the JFTC record which was produced to them by the defendants in accordance with the Federal Rules of Civil Procedure.

chasers of Japanese-made consumer electronic products relating to certain import transactions. We do not rule on the admissibility of any of those documents in this opinion. However, the legal questions involved in determining the admissibility of the import-related documents are essentially the same as those considered herein.[3] As a result, the legal rulings in Part II, *infra*, will relate as well to the import transaction documents. To the extent that rulings on the admissibility of particular import-related documents are necessary, we will make them in our forthcoming opinion deciding the defendants' motion for summary judgment on proof of conspiracy.

Before we proceed further, some explanation is in order as to our reasons for writing a long opinion about admissibility of the documents relating to activities in Japan, while reserving admissibility rulings relative to import related documents. When we first addressed defendants' summary judgment motions in April 1979, we were compelled to postpone consideration of those motions addressing plaintiffs' conspiracy claims because of the amorphous state of the record. At that time plaintiffs were invoking in support of these claims not only the entire JFTC record of some 6300 pages, but also an unlimited number of documents from among the millions of documents produced for inspection during discovery. It was clear to all concerned that out of this huge record there were a limited, though yet unidentified, number of critical documents whose admissibility it was important to determine and that, at all events, it was impossible for us to decide the summary judgment motions in the absence of a more discrete record. We concluded that what was first required was the filing of plain-

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[3] The principal basis upon which plaintiffs seek admission of the import related documents are F.R.E. 803(6), the business records exception to the hearsay rules, F.R.E.'s 803(24) and 804(b)(5), the so-called residual hearsay exceptions, and F.R.E. 804(b)(3), the statements against interest exception, all of which are dealt with extensively herein. Moreover, the factual patterns which affect admissibility *vel non* under the proper construction of these rules are very much the same for the import related documents as they are for the documents considered in the opinion.

Judiciary Committee explained its reasons for restoring limited residual exceptions to the Rules:

> [W]e feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.
>
> The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible. . . .
>
> The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules. . . .
>
> *It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.* The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

(emphasis added), U.S.Code Cong. & Admin.News 1974, p. 7065.

There are essentially three legal issues before us with respect to the residual exceptions. Initially, we must determine whether the residual exceptions are available to render admissible evidence which appears to fall within a category encompassed in one of the specified hearsay exceptions, *e.g.*, former testimony or business records, but which fails to meet the precise requirements of the specific exception. In our hearings, this issue has been dubbed the "near miss" question. Secondly, we must interpret the provision in the rule requiring the proponent to make reasonable efforts to secure equally probative evidence. Finally, we must analyze the trustworthiness requirement of the rule. We address these issues in the order stated.

2. *The "Near-Miss" Problem*

The defendants contend that the residual hearsay exceptions cannot be invoked as the basis for the admissibility of evidence which is generically of a type covered by another specific hearsay exception, but which fails to meet the precise requirements of that specific exception.[90] For instance, they

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[90] In a related contention, the defendants have urged that if an item fails to meet the terms of one of the specific hearsay exceptions, it may not be offered under another of the specific exceptions. On this view, for instance, if a document is generically a business record, but fails to qualify for admission as such under Rule 803(6), it may not be offered under any other hearsay exception. We reject that view. There is nothing in the language or the structure of the hearsay rules to suggest that the specific exceptions are exclusive in their application, and the Judiciary Committees of both Houses of Congress expressly rejected the position advanced by the defendants in their comments on Rule 803(5). The House Committee stated:

> [I]t is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

House Report, U.S.Code Cong. & Admin.News 1974, p. 7087. The Senate Committee expressed its agreement with this principle, using virtually the same language as the House Committee. Senate Report. This clear statement of legislative intent precludes any assertion that the specific hearsay exceptions are exclusive of one another. In our view it does not, however, defeat defendants' "near miss" contentions with respect to the residual exceptions. The quoted statement of the House Judiciary Committee cannot

contend that if a document is a "business record" it must qualify for admission under Rule 803(6), and not under the residual exceptions. The plaintiffs counter that there is no such rule of law, and cite a number of cases in which courts have considered the admissibility of evidence under the residual exceptions after finding that the evidence failed to meet the terms of one or more of the specific exceptions. *E.g., United States* v. *Hitsman*, 604 F.2d 443 (5th Cir. 1979).

We agree in principle with the defendants. The Advisory Committee explained its proposed residual exception, which was broader than the one enacted by Congress, as designated for "new and presently unanticipated situations." The Senate Judiciary Committee, which drafted the present rule, commented that "an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." The Senate Committee also stated its intent "that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." U.S.Code Cong. & Admin.News 1974, p. 7066. We find it clear from the history of the rules that neither the Advisory Committee nor the Senate Judiciary Committee intended that the residual exceptions be used to qualify for admission evidence which is of a type covered by a specific exception, but which narrowly fails to meet the standards of the specific rule. Instead, they intended that the residual exceptions be used in exceptional and unanticipated situations which are not specifically covered by the specific exceptions.[91]

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be applied to the residual exceptions, since the House Committee would have eliminated the residual exceptions entirely. The statement of the Senate Committee must be interpreted in light of that Committee's more specific comments on the residual exceptions, which we consider in the text.

[91] Mr. Justice Stewart, joined by Mr. Justice Marshall, has commented:

> It seems to me open to serious doubt whether Rule 804(b)(5) was intended to provide case-by-case hearsay exceptions, or rather only to permit expansion of the hearsay exceptions by categories.

McKethan v. *United States*, 439 U.S. 936, 939 n. 3, 99 S.Ct. 333, 335 n. 3, 58 L.Ed.2d 333, *denying cert.* to *United States* v. *Garner*, 574 F.2d 1141 (4th Cir. 1978) (dissenting opinion). Although this statement is somewhat cryptic, we view it as a reference to the point at issue before us. *Cf.* Saltzburg at 241 (1980 Supp.) (criticizing Justice Stewart's language and arguing for a case-by-case approach.)

The defendants' position is also supported by a basic principle of statutory construction, which we find equally applicable to the Federal Rules of Evidence: that the specific controls the general. As the Supreme Court stated in *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992-1993, 48 L.Ed.2d 540 (1976):

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 [(1974)].

In conformity with this rule we conclude that the residual exceptions cannot be invoked when there is a specific exception which sets forth conditions governing the admissibility of a clearly defined category of hearsay evidence.[92]

For example, the exception for former testimony, Rule 804(b)(1), applies to a clearly defined category of evidence and specifies conditions which must be met in order for evidence in that category to be admissible. *See* Part II-D, *supra*. We will thus not consider a proffer of former testimony under the residual exceptions if the testimony fails to meet the specific requirements of Rule 804(b)(1), such as unavailability of the declarant, and similarity of motive to develop the testimony at the former hearing. Some of the other specific hearsay exceptions similarly apply to a clearly defined category of evidence, and we would follow the "near miss" doctrine with respect to

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[92] In *United States* v. *American Cyanamid Co.*, 427 F.Supp. 859, 865 (S.D.N.Y. 1977), Judge Brieant rejected the government's contention that the residual exceptions could not be invoked without a specific showing that the evidence offered thereunder was "exceptional." We agree with that ruling, but do not find it pertinent to the issue raised by the defendants in this case.

them as well, if the evidence before us were within those categories. *E.g.*, Rule 803(18) (learned treatises); Rule 803(22) (judgment of previous conviction.)

However, most of the hearsay exceptions which plaintiffs invoke are not of this type. They do not apply to a clearly defined category of evidence, as the former testimony exception does. Instead, they apply to a relatively amorphous category of evidence which is delimited solely by the requirements set forth in the rule itself. For instance, the business records exception applies to any "memorandum, report, record, or data compilation, in any form" which satisfies certain additional requirements. *See* Part II-B, *supra*. Rule 804(b)(3) applies to any "statement" which is against the declarant's interest, as specified in that rule. *See* Part II-E, *supra*. We view rules 803(1) (present sense impression) and 803(5) (recorded recollection), under which the plaintiffs also offer the diaries and memoranda, as of the same character. *See* n.48, *supra*. We do not see how the "near miss" doctrine which defendants urge could practically be applied to those rules, without negating the residual exceptions altogether, a result which is plainly contrary to the intent of Congress.

Accordingly, although as we have stated we agree with the defendants' position in principle, we will not apply it to the evidence before us, except for former testimony, and we will consider plaintiffs' proffer under the residual exceptions. We note, however, that the considerations which we have reviewed in this section of our discussion are additional reasons to apply the express requirements of the residual exceptions most rigorously, so as not to vitiate the hearsay rule and the specific exceptions. We turn next to those express requirements.

3. *The Requirement of Making Reasonable Efforts to Procure Other Evidence.*

Rules 803(24) and 804(b)(5) expressly require that the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The rules thus have their own requirement of unavailability of the witness or of similarly reliable evidence. Where a declarant is available for questioning, this provision requires at least that a proponent depose or produce him as a witness, if that can reasonably be done, since live testimony is inherently more probative than hearsay evidence. *United States* v. *Mathis*, *supra*, 559 F.2d at 298-99.

Several courts have held that in order to satisfy the requirement of the residual hearsay exceptions, the proponent of the hearsay evidence must attempt to procure the testimony, not only of the declarant, but also of *other* witnesses who have knowledge of the subject matter of the hearsay evidence. In *In the Matter of Sterling Navigation Co.*, 444 F.Supp. 1043 (S.D.N.Y.1977), the district court affirmed the bankruptcy court's refusal to admit under 804(b)(5) testimony of an unavailable declarant where other witnesses with knowledge of the subject matter were not deposed. Because the president of a bankrupt Bahamian corporation was unavailable, a creditor sought to introduce the president's former testimony at a bankruptcy hearing as evidence of stock ownership and loan-making authority in the corporation. But since others who might possess similar information were not questioned, the proponents did not meet the necessity requirement of the residual exception. The District Court said:

> [N]o affirmative steps had been taken to depose the Bahamian shareholders. . . . It appears that Council [proponent] was content to offer its transcript without making the requisite reasonable efforts to obtain other eivdence. In view of this attitude it can hardly be said that the interests of justice would be served by admitting the evidence.

Id. at 1047. We agree.

In *deMars* v. *Equitable Life Assurance Society*, *supra*, the First Circuit reversed the district court's ruling admitting the written report of an unavailable medical expert on the grounds that the proponent could have procured the opinion of another expert witness. 610 F.2d at 61. In *United States* v. *Kim*, *supra*,

the D.C. Circuit upheld the district court's ruling that a telex was not admissible under the residual exception because, *inter alia*, the proponent of the evidence had failed to procure other documentary evidence or testimony of knowledgeable persons other than the author of the telex. 595 F.2d at 766. In *Workman* v. *Cleveland—Cliffs Iron Co.*, 68 F.R.D. 562 (N.D.Ohio 1975), the court refused to admit the hearsay statement of an unavailable declarant under 804(b)(5) because the proponent of the evidence had made no effort to secure the testimony of other witnesses to the events dealt with in the hearsay statement.[93] In view of the rigor with which the requirements of the residual exceptions should be construed, we agree with these courts that the proponent of hearsay evidence under the residual exception must attempt to procure the testimony by deposition not only of the declarant, but also of any other witness with knowledge of the subject matter of the statement, unless such testimony plainly cannot be procured by reasonable means.

4. *Trustworthiness*

Evidence to be admitted pursuant to the residual exceptions must possess "circumstantial guarantees of trustworthiness" equivalent to the other enumerated exceptions under Rules 803 and 804. The court of appeals has said that the trustworthiness of a statement, for purposes of the residual exceptions, should be analyzed by evaluating:

> the facts corroborating the veracity of the statement, [and] also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely. Further, consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness.

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[93] In *Bailey, supra*, the court of appeals noted the existence of the requirement that the statement be more probative than other evidence which the proponent reasonably could procure, 581 F.2d at 346, but had no occasion to discuss or apply that requirement. In *Copperweld Steel Co.* v. *Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978), the court viewed this requirement as waived. *Id.* at 964 n. 17.

United States v. *Bailey*, 581 F.2d 341, 349 (3d Cir. 1978). Additional factors bearing on the trustworthiness of hearsay evidence are discussed in our analysis of the trustworthiness requirement of the business records exception in Part II-B-3, *supra*. In contrast to the trustworthiness provision of Rule 803(6), however, the trustworthiness requirement of the residual exceptions is part of the plaintiff's affirmative burden of establishing admissibility.

G. *The Problem of Internal Hearsay*

Many of the documents upon which we must rule are laden with internal hearsay. The diaries in particular are full of statements which internal or external evidence shows to be hearsay statements made by another person and merely recorded by the diarist. Even the testimony and protocols contain hearsay statements; according to the representations of counsel, hearsay evidence is not excluded in Japanese legal proceedings. The pervasiveness of internal hearsay necessitates some comments on the legal standards relating to hearsay within hearsay and hearsay within admissions.

1. *Hearsay Within Hearsay*

Rule 805 makes it clear that hearsay within hearsay is not admissible unless each of the hearsay components independently satisfies an exception to the hearsay rule. *See, e.g., United States* v. *Ruffin*, 575 F.2d 346, 357 (2d Cir. 1978). Thus a statement in a diary, for example, which recounts the hearsay statement of another person is double hearsay if it is offered for the truth of the matter asserted by the person whose statement is recorded. At the first level, it is hearsay because it is the statement of the diarist offered to show that the other declarant made the statement attributed to him. At the second level, it is hearsay because it is the statement of the other declarant offered for the truth of what he said. Unless the plaintiffs, as proponents of the evidence, can show that the statement recounted can overcome hearsay objections at both levels, it is not admissible evidence.

The plaintiffs argue that internal hearsay should be admitted across the board under the residual exceptions, rules 803(24) and 804(b)(5).[94] They rely heavily on *Sherrell Perfumers, Inc.* v. *Revlon, Inc.*, 1980-2 Trade Cas. ¶ 63,293 (S.D.N.Y. 1980), *further consideration*, 76 Civ. 4572 (S.D. N.Y. July 15, 1980), in which Judge Sweet found particular double-hearsay statements admissible under 803(24). We have no doubt that the residual exceptions may be applied to internal hearsay as well as first-level hearsay, if the requisites of those exceptions are met. However, as we have explained in Part II-F, *supra*, the residual exceptions should be narrowly construed. We can perceive no justification for misapplying the exceptions in the manner for which plaintiffs contend so as to negate the rule against internal hearsay. Moreover, the specific requirements of the residual exceptions must be met in order for a statement to be admissible under them. The requirements include a showing by the proponent of the evidence that it is more probative on the point offered than any other evidence which the proponent could procure by reasonable means, including depositions of other witnesses. *See* pp. 1264-1265, *supra*. In *Sherrell Perfumers*, Judge Sweet found the latter requirement met. 1980-2 Trade Cas. at p. 75,554. Thus, in considering plaintiffs' proffer of hearsay evidence under the

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[94] At one point plaintiffs argued that if a document is admitted under the business records exception to the hearsay rule, any statement contained therein, hearsay or not, may be received and considered by the trier of fact. They did not press the point strongly. At all events, it is plainly incorrect. It is plain from Rule 805, as well as the structure of Article VIII of the Federal Rules of Evidence that what a declarant could not testify to on the witness stand (because of hearsay rules) cannot come in via a document itself admitted under one of the hearsay exceptions. While Rule 803(6) does operate to a very limited extent as a second level hearsay exception, it does not create an across-the-board admissibility for internal hearsay statements. The limited second-level exception mentioned arises from the fact that Rule 803(6) permits the admission of hearsay evidence which was transmitted to the declarant by another person with knowledge, acting in the course of a business duty. *See* part II B-5, *supra*. To that limited extent Rule 803(6) operates both as a first-level and a second-level hearsay exception, *i.e.*, it permits the receipt into evidence of internal hearsay which meets its specific requirements despite the more general strictures of Rule 805.

residual exceptions, we must consider, *inter alia*, whether this special requirement of the exceptions is met. We must also consider, of course, whether the internal hearsay meets the specific terms of any other hearsay exceptions so as to render it admissible.

2. *Hearsay Within Admissions*

Under the Federal Rules of Evidence, admissions under Rule 801(d)(2) are non-hearsay, rather than hearsay admitted under an exception. As a result, hearsay within an admission is not strictly within the terms of Rule 805, governing "hearsay included within hearsay." We think, nevertheless, that internal hearsay in a statement which comes into evidence as an admission must be subjected to an independent analysis to determine whether or not it would survive a hearsay objection in its own right.[95] In *Cedeck* v. *Hamiltonian Federal Savings and Loan Association*, 551 F.2d 1136 (8th Cir. 1977), the Eighth Circuit held that a statement made by the employee of the defendant could not come into evidence as an admission because it was merely "a reiteration of what someone told him," and was not independently admissible as an admission or under a hearsay exception. We agree that the mere reiteration by a party's agent of the statement of another person does not render the statement an admission against the party, unless the party or his agent adopted the statement within the meaning of Rule 801(d)(2)(B). *See* Part II-C, *supra*.

We have now concluded our survey of the law applicable to the evidence whose admissibility we will consider in this opinion. The survey has been long, but we will now be able to resolve the specific evidentiary questions before us with dispatch, by incorporating referenced portions of the foregoing

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[95] Our view is supported by the Congressional amendment to Rule 806, which provided that in matters affecting the credibility of the declarant, admissions under Rule 801(d)(2)(C), (D) and (E) are to be treated the same as hearsay statements. *See* n. 61, *supra*. This suggests that admissions under those subsections should be subjected to the same internal hearsay analysis as statements admitted into evidence under the hearsay exceptions.

discussion. We turn first to the admissibility of the Yajima diaries.

III. *The Yajima Diaries—DSS 48-50*

A. *Introduction*

The Yajima diaries, DSS 48-50,[96] are three notebooks which the Japanese Fair Trade Commission ("JFTC") seized during the course of its investigation in the "Six Company Case." Plaintiffs contend that the notebooks were authored by a Toshiba official named Seiichi Yajima, who during 1965 and 1966, the period covered by the diaries, attended on Toshiba's behalf meetings of the so-called "Tenth Day Group," one of a number of groups allegedly engaged in price fixing activities within Japan. The diaries were marked as exhibits during the course of the "Six Company Case." Toshiba Corporation produced these notebooks to plaintiffs during the summer of 1972 in response to a Request for the Production of Documents which had been served by plaintiff NUE at the outset of the litigation and which called for all documents relating to the Six Company Case. The notebooks were designated with document identification numbers TJ4514-4593; TJ4598-4631; and TJ4646-4660, respectively.[97]

Plaintiffs offer the diaries in evidence against all the defendants in this action. More specifically, plaintiffs offer these diaries as business records under F.R.E. 803(6), as admissions of Toshiba Corporation under F.R.E. 801(d)(2), as a declaration against the interest of Mr. Yajima under F.R.E. 804(b)(3) and as admissible under F.R.E. 804(b)(5), one of the residual hearsay exceptions. Plaintiffs' overriding proffer is that the

[96] Each document considered at the evidentiary hearings was accompanied by a "Document Submission Sheet" or "DSS," the function of which is explained in the Public Records Opinion at 17.

[97] The documents produced in discovery ran into the millions, hence counsel established an elaborate document identification system. At the core of the system is a series of lettered prefixes, such as "TJ," which identify the company making the production. The numbers following the prefix are a function of the parties' labors in numbering each produced page.

diaries are an authentic account of what took place at the meetings of the Tenth Day Group and other groups mentioned therein.

Our modus procedendi in dealing with these diaries shall be first to set forth the plaintiffs' and then the defendants' contentions as to matters of foundation or qualification, *i.e.*, we shall set forth the factual and to some extent the legal basis for the parties' contentions that the proffered documents are (or are not) authenticated under F.R.E. 901 and that they are (or are not) admissible under one of the exceptions to the hearsay rules. This initial summary is essentially complete vis á vis the parties' contentions on authentication and business record status; as to the status of the diaries as admissions of a party-opponent, as statements against interest, and under the residual hearsay exceptions, we shall supplement the statement of contentions in the course of our later discussion. While this recitation of contentions will sometimes be lengthy, its fullness will facilitate our application of legal principles to the challenged documents. We shall also follow this modus procedendi in connection with the other documents which are taken up in subsequent segments of this opinion.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The diaries are specifically cited, indeed incorporated by reference, in Toshiba's answers to interrogatory numbers 8 and 42-44 to NUE's second set of interrogatories to defendants. In plaintiffs' submission, by this reference, Toshiba has, in effect, conceded authentication, business records status, and other necessary foundation for the diaries.

(2) The three diaries were lawfully seized by the JFTC from Toshiba's offices and turned over to the JFTC by Mr. Kono, then the manager of the TV division. Upon their return, Toshiba made copies of the diaries and produced them to the plaintiffs.

(3) One of the diaries, DSS-48, contains the Toshiba logo in Japanese and English at the top of the page.

(4) During the Six Company Case Mr. Yajima gave to the JFTC investigators four protocols (DSS-75, DSS-76, DSS-77, and DSS-78) during which Mr. Yajima identified the diaries. The protocols, which bear a seal, have a recognized legal status in Japan.

(5) During the course of his formal testimony before the JFTC, Mr. Yajima identified the diaries, testified to certain entries, and said that they were accurate and reflected meetings of the six defendants.

(6) Yajima's protocols and testimony also include statements that show that he was present at the meetings he recorded in his diary.

(7) The notebooks appear in the JFTC "investigator's list of evidence" (DSS-93) which plaintiffs claim is an official record of the JFTC.

(8) Testimony of defendants' other employees at the JFTC hearing and statements by defendants' other employees in their protocols referred to one of Yajima's notebooks to confirm what occurred at a meeting.

(9) Mr. Kamakura's protocol makes reference to Yajima's presence at the meetings.

(10) Mr. Yajima allegedly reported to this superiors at Toshiba after returning from certain meetings, passing on information on which they relied.

(11) The diary is on its face a business record; *i.e.* it pertains purely to business matters which are of importance to Toshiba, and it looks and reads like a business record (the "res ipsa loquitur" contention).

(12) Yajima's obligation to attend meetings and to make reports to Narita suggests that the information that he entered in the diaries was maintained by him as his regular practice; moreover, the entries (about the Tenth Day meetings) occur at fairly regular intervals.

(13) The secretary company of the Tenth Day Group meeting would take down information for production, shipment and inventory, and since Yajima testified that Toshiba was the secretary company from March 1966 to June 1966, when Yajima was recording Tenth Day Group information, he was acting on behalf of the Group and his own company.

(14) Entries were made periodically relating to regular subject matters. They covered basically the same type of information month after month. These topics were continually discussed, and it was part of the practice at these meetings and part of Yajima's practice to record this type of information.

(15) When Yajima was shown the diary during the taking of the JFTC protocol, Yajima said "This notebook is mine and what was written in it deals with the events of this year and was written on the spot."

C. *Defendants' Response*

(1) There is no testimony on the record of this case by a "custodian or other qualified witness," F.R.E. 803(6), or in fact by anyone authenticating or establishing the foundation required by the admission of any of these diaries into evidence. Indeed, plaintiffs took no deposition of any person who (i) had knowledge of the manner in which the notebooks were kept and (ii) could confirm the contents of the notebooks. Rather, plaintiffs rely for foundation completely upon their counsel's presentation to the court.

(2) The Toshiba logo appears on only one of the diaries (DSS 48), and in any event, the fact that Toshiba stationery was used is of no significance.

(3) There are time gaps in the notebooks: DSS 48 refers to November 1965 to December 1965; DSS 49 refers to the period January 1965 to June 1965; DSS 50 refers to the period January 1966 to November 1966. There is no notebook for the period July through October 1965.[98]

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[98] Defendants also note correctly that there were numerous Tenth Day Group meetings allegedly attended by Yajima which are not mentioned in the diaries.

(4) The "Yajima Protocols" cited by plaintiffs as places where Mr. Yajima identified the diaries are simply brief passing references to only two of the diaries which, in fact, do not establish that the diaries are admissible under any of the exceptions to the hearsay rules.

(5) The Yajima testimony also does not establish the foundation for the admission of the diaries into evidence. Only one of the diaries is referred to during Mr. Yajima's testimony and only in passing references which do not establish the foundation for the admissibility of the documents.

(6) Toshiba's interrogatory answers do not establish the necessary foundation for the admissibility of the diaries, since the diaries were produced in response to a Request for the Production of Documents, not as answers to Interrogatories. At all events, the interrogatories did not request information relating to the substance of the meetings or the necessary foundation for the admissibility of the diaries. Moreover, Toshiba, in its interrogatory answers, specifically disclaimed any knowledge concerning the accuracy of the Yajima diaries or concerning what took place at any of the meetings of the groups about which the interrogatories inquired. *See* Toshiba's Answers to Interrogatories 8, 42, 43, and 44 of Plaintiff's [NUE] Interrogatories Set No. 2.

(7) The testimony and protocols of Messrs. Adachi, Narita, Tsurata, and Kamakura also do not establish the foundation for the admissibility of the diaries since these references to the diaries do not establish any of the requirements of any of the exceptions to the hearsay rules, and are merely passing references to diaries which were being used merely to refresh the recollection of the witness.

(8) While the protocols and testimony contain some statements to the effect that Mr. Yajima reported to his superiors after attending meetings, there is nothing in the record establishing that he utilized his diary for this purpose. Further, there is nothing in the record of this case establishing that

Mr. Yajima was under a business duty to keep his diary; nor is there anything in the record of this case to show that Mr. Yajima systematically checked his diary or that it was his continuous habit to keep the diary.

(9) The diaries themselves are a "hodge podge" of notes which are pointless without the testimony of some person who was present at the meetings. One cannot even tell with any certainty where accounts of meetings begin and end; whether the accounts are what the author thought or surmised, or what someone else said, and if so, who said it. Further, there are at least 28 separate entries which the translators noted as "illegible."

(10) The diaries contain double and triple hearsay, and because of the manner in which the entries were kept, it is impossible to sort out what is based upon Yajima's personal knowledge and what is based upon hearsay. Further, Mr. Yajima stated in his protocol that the information he obtained from other companies at meetings was in large part based upon "guesses" and "hunches." Therefore, it is impossible to sort out what part of his diary is guesswork and what part was actually heard by Mr. Yajima.

Against this background of contentions, we now apply our discussion of law (Part II) to the Yajima diaries on the basis of the developed record.

D. *Authentication (F.R.E. 901)*

Although the question is a close one, especially as against defendants other than Mr. Yajima's employer, Toshiba Corp., we find, pursuant to the applicable Rule (F.R.E. 104(b)), that the diaries have been authenticated under the prima facie standard of *United States* v. *Goichman*, *supra*, as the genuine diaries of Mr. Yajima. Put differently, there is sufficient admissible evidence from which the trier of fact could conclude that the diaries are what their proponents claim (i.e., Mr. Yajima's diaries). In this regard, we rely upon the items of

evidence hereinafter enumerated, making shorthand reference to the evidence that has been more fully described, *supra*, in one or the other of the parties, contentions.

(1) The Toshiba logo. See Part II-A-3(b), *supra*.

(2) The protocols, which we find admissible against Toshiba only, *see infra*, but which identify the diaries.

(3) Yajima's testimony, which we find admissible against all defendants in its authentication aspect only, *see* Part VIII-C-4, *infra*, and which identifies the diaries.

(4) Toshiba's production of the diaries and reference to them in its Rule 33(c) interrogatory answers.[99] See discussion at Part II-A-3(a), *supra*.

(5) The cross-reference to Mr. Yajima in the other defendants' interrogatory answers and JFTC testimony.

(6) The similarity to other authenticated documents. See discussion at Part II-A-3(d), *supra*. While there has been no testimony by any custodian or "subscribing witness," such is unnecessary under Rule 903.

E. *Business Record Status (F.R.E. 803(6))*

For the reasons which follow, we conclude that the plaintiffs have not qualified the Yajima diary as a record of regularly conducted activity under Rule 803(6). Furthermore, we conclude that defendants have shown a lack of trustworthiness under the 803(6) trustworthiness proviso. We make this determination pursuant to F.R.E. 104(a), hence, we give the plaintiffs the benefit of inadmissible as well as admissible evidence. Our conclusion flows from a host of individual reasons, but there are several overriding considerations which we state at the outset in terms of the legal requisites of Rule 803(6). To the extent necessary, we incorporate by reference what we said of the diaries in general at pages 1211-1213 of the Preliminary Statement, for everything we wrote there applies to Yajima's diary. As is already clear, we basically accept defendants' contentions in this area.

[99] The Answers to Interrogatories are admissible only against Toshiba. They are hearsay as to others than the answering party, *see* n. 40 *supra*.

1. *The Regular Practice Requirement*

As we have seen, one aspect of qualification of a business record is the necessity of demonstrating that the record was "kept in the course of a regularly conducted business activity," and that "it was the regular practice of that business activity to make the record." We refer to that aspect of the business records rule herein as the regular practice requirement. As such, it has two parts and the plaintiffs have made much of the first part, ignoring the second. Defendants do not dispute that Yajima's activities and the matters related in the diaries were business-related and that any information garnered from the Tenth Day Group meetings was used in Toshiba's business.[100] But as defendants correctly argue, the plaintiffs have totally failed to show that the diaries meet the requirement of regularity described at length in Part II-B-2. For, as we therein explained, F.R.E. 803(6) contemplates the admission of materials which are created by routine practices where careful checking and habits of precision and regularity assure their accuracy. There is no evidence before us from any source of any routine practice or careful checking by Yajima or any habit of precision or regularity. None of the proffers of plaintiffs supply these requisites, nor do the diaries themselves, and neither the

[100] During the relevant period, Yajima was either manager of the second television section of Toshiba (color TV) or manager of the first television section of Toshiba (black and white TV) or both, with responsibilities for production and sales planning. While not near the top of the Toshiba hierarchy, Yajima had broad managerial responsibility, and his attendance at and observations of the Tenth Day Group meetings were apparently within the scope of the authority with which he had been entrusted by Toshiba. Ostensibly, Yajima reported to his superiors the results of the meetings. Plaintiffs contend that Yajima used his diaries to report to other Toshiba officials, but they have not produced any evidence to support their contention, though they might have done so by the simple expedient of deposing any of the many Toshiba officials, peers or superiors, who were familiar with Yajima's practices and who have been available for depositions for many years. Mr. Tadashi Kamakura is but one such person.

testimony nor protocols of Mr. Yajima nor anyone else supply the missing but necessary requisite for 803(6) status.

The testimony and the protocols contain only passing references to the diaries, hence plaintiffs' argument based thereupon must fail.[101] Toshiba's Answer to Interrogatories and Rule 33(c) productions have been discussed at length in Part II supra, and we have explained there why these factors do not qualify the diaries as business records. The reference in one diary to contemporaneous recordation is just that, a random reference. There is, on the other hand, extensive evidence of gaps in these diaries, failure to record numerous meetings,[102] and delay in recordation.

In contrast to notions of regularity, the diaries are erratic. They are, like most notes that one keeps for oneself, written in an irregular and shorthand manner which Yajima himself doubtless understood, but which no one else can. One cannot tell with any certainty where accounts begin and end. The diaries are laden with all kinds of arrows and symbols and code—like notations and references which are unintelligible. Indeed, the diaries are dominated by cryptic entries. In no sense are the diaries what one could fairly describe as minutes of meetings. With a few exceptions upon which we shall comment, one can never tell whether a given word or phrase or statistic or thought set forth in the diaries represents the statement of some individual, and if so, who he was or what he said. More specifically, the reader cannot tell what Yajima meant by a given entry or what its source is—whether someone said something, whether someone told him that someone said something, whether he thought something, or someone told him that someone thought something, et cetera.

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[101] Mr. Yajima refers to his diaries only three times in his protocols. None of these statements gives meaning to the diary entries, let alone establishes the foundation requirement of F.R.E. 803(6). These three passing references are contained in DSS 75 (MJ3278-1); DSS 76 (MJ3260-1); and DSS 77 (MJ3261-1).

[102] In Appendix B to their FPS, plaintiffs claim that 21 meetings of the Tenth Day Group occurred within the period subsumed in Yajima's diaries, yet there are only 11 entries in the diaries for this period.

Where there are numbers arranged in juxtaposition to the names of various Japanese manufacturers of consumer electronic products, or where Yajima places a number which could be interpreted as a bottom price next to the name of a company, it would be possible to conclude that we have been supplied with evidence that production figures or "bottom prices" have been exchanged by company representatives present at this meeting. But that would only be speculation, for we do not really know what Yajima meant by his entry. Equally important, we do not know when and where he got the information, including figures, which he recorded or when he recorded the entries. And even where there are supposed statements of position arranged beside the name of a manufacturer of consumer electronic products, we know nothing of the source of information or the time or manner of recordation. While some of the things we have been saying bear upon the firsthand knowledge requirement which we shall discuss *infra*, they also bear upon the regularity of practice requirements insofar as they relate to the author's method of preparing the diaries.

We have considered all of plaintiffs' alleged foundation bases and found them wanting. The res ipsa loquitur approach is totally unavailing for the reasons we have stated. Neither the protocols in the testimony nor any cross-authentication is sufficient. Passing references or even affirmations of accuracy of an occasional entry will not suffice. The mere fact that Yajima attended meetings of the Tenth Day Group or reported to his superiors thereupon (and there is no evidence he used his diaries to do so) does not satisfy the regular practice requirement. No more availing is plaintiffs' reliance upon "a pattern of reporting the conduct of the meetings" to both superiors and subordinates. That fact has not been established in this record, but even if it had and even though entries are "business related," the regular practice requirement is not thereby met.

Not only have plaintiffs failed to qualify the diaries, but the indications which appear are contra—indications negating a finding of regular practice. The short of it is that the foundational contentions set forth by defendants are correct. The

diaries are hodge-podges of notes in which Mr. Yajima has not explained with any degree of clarity what he meant. Plaintiffs have failed to meet the regular practice requirement explained in Part II.

The plaintiffs assert that code—like entries do not deprive a document of business record status, citing *United States* v. *Baxter*, 492 F.2d 150, 164 (9th Cir. 1973), *cert. dism.*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974), where the court admitted the customer book left by a member of a heroin importation conspiracy which contained ambiguous nicknames and code-names. But what plaintiffs neglect to mention is that the author of the notebook testified at trial (he was the government's informant and "star" witness), hence, was subject to cross-examination on the notebook. Rather, the situation we face here is similar to what the court faced in *United States* v. *Lykes Bros. S.S. Co.*, 432 F.2d 1076, 1079 (5th Cir. 1970), where, affirming the district court's refusal to admit internal "notes" produced by the defendants, the Fifth Circuit stated:

> "An examination of the notes does not reveal either when they were prepared, by whom they were prepared, for whom they were prepared, or from what source of information they drew. The notes, therefore, of themselves, do not overcome the lack of a proper foundation which the government otherwise failed to provide."

Plaintiffs rely heavily upon *McPartlin*, *supra*, but there the diarist took the witness stand, was subject to in-court examination, and the diary was used only to refresh recollection and corroborate dates. That is not what is attempted here. Rather, plaintiffs seek to introduce the diaries and then to argue from bits and pieces, from selected words and sentences that there was (export) conspiratorial activity afoot. This is a clever litigation strategy, but one which they cannot successfully pursue because of the lack of foundation for admissibility of their evidence.

It is of course true that Yajima died before this action was instituted. However, as we have noted, others might have been called in an attempt to qualify his diary, but they were not. Yajima's superior, Mr. Kamakura, attended many meetings of the Tenth Day Group with Yajima. Presumably, he could have clarified Yajima's diary or described Yajima's reporting practices. Perhaps he could have explained (or perhaps he would have "explained away") the bits and pieces of the diary that plaintiffs rely upon. In any event, although he is alive and well and employed by Toshiba and has been available for depositions for years, he has not been called. Others familiar with Yajima's work and habits might have been called too, but they were not. We must again underscore in this regard that our remarks are not just retrospective. Plaintiffs' litigation strategy, as clearly explained by Mr. Rome, contemplated that the plaintiffs would not call any such witnesses at trial, a strategy confirmed by his failure to list any such witnesses in his FPS.

2. *Requirement of Firsthand Knowledge and Contemporaneity*

Plaintiffs have also failed to demonstrate that the diaries were made by a "person with knowledge or from information transmitted by a person with knowledge." Yajima's diaries contain double and triple hearsay, and because of the manner in which the entries were kept, it is impossible to sort out what is based upon Yajima's personal knowledge and what is based upon hearsay. Yajima stated in his protocol that information he obtained from other companies at meetings was in large part based upon "guesses" and "hunches."[103]

As we have noted, the firsthand knowledge requirement of 803(6) is subject to the provision that information may properly

[103] For example, he stated in his protocol that his entry concerning a March 23, 1965, Palace Group meeting was founded on hearsay:

> "But I don't know where it [the entry] was determined, it is just a note of what I heard from the director."

be transmitted to the recorder by someone with knowledge and with a duty to report. However, neither has that requirement been met as to any matters which may have been reported to Yajima by others. Again, plaintiffs' reliance upon circumstantial evidence and colloquy instead of upon conventional methods of laying foundation has failed them, for we have no evidence that such others themselves have firsthand knowledge or a duty to report. The diaries do not explain themselves, and no one, via deposition, has explained them. Nor, as we have noted above, will they do so in trial testimony, because of the failure of plaintiffs to list any such person in the FPS.

3. *The Trustworthiness Proviso*

Rule 803(6) provides for the exclusion of business records which otherwise meet its requisites when the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The burden is upon defendants to show lack of trustworthiness.

We shall not burden the record by rescribing our description of the diaries. However, given that description, we do not believe that diaries possess the circumstantial guarantees of trustworthiness that the hearsay rules implicitly and 803(6) explicitly require. The word "trustworthiness" hardly needs an exegesis in this context. Suffice it to say that the inadequacies of the diaries which we have described in such detail make it clear that where diaries such as these are sought to be admitted for the truth of their contents, they cannot be accorded faith or credit or trust within the framework of a judicial system which does not countenance guesswork or speculation. In short, a document which is unintelligible is not trustworthy. Plaintiffs might have supplied the necessary foundation, but they have not. The defendants have met their burden of showing that the diaries are untrustworthy, and that is another ground of 803(6) exclusion.

F. *Admissions of a Party Opponent*

Having held that the diaries as a whole cannot come in (against all defendants) as business records, we must consider whether individual passages from Yajima's diaries may nonetheless come in as admissions of a party opponent, *i.e.* Yajima's employer Toshiba Corp., under F.R.E. 801(d)(2). Conceivably, such an approach might require us to analyze every passage in the diaries to see if it can pass 801(d)(2) muster, as well as to determine with respect to each passage whether Yajima was authorized to make the statement (the diary entry) under Rule 801(d)(2)(C) or whether it was made within the scope of his employment so as to qualify under Rule 801(d)(2)(D).[104] Because they are simpler of resolution we turn to the latter considerations first.

There is no foundation in the record which bears on, much less establishes, whether Mr. Yajima was authorized by Toshiba to make a statement (*i.e.* make a diary) concerning the subject (presumably the subject matter of the Tenth Day Group meetings). Accordingly, there is no basis for their admissibility under F.R.E. 801(d)(2)(C). However, with the exception hereinafter noted, it seems plain that attendance at the Tenth Day Group meetings was within the scope of Yajima's agency or employment, that the diaries concern matters within the scope of his agency or employment, and that they were also made during the existence of the employment relationship. Yajima was at various times manager of marketing planning for color as well as black and white TV in Japan and it would seem that *making* a diary would be impliedly within the scope of his employment. There is no evidence that he was forbidden to make a diary and it would be hypertechnical to hold that the act of making a diary was beyond the scope of his employment. F.R.E. 801(d)(2)(D) is thus satisfied. The excep-

[104] Notwithstanding plaintiffs' contentions, there is no evidence of adoption of the diaries either by Yajima (in his protocols or testimony) or, more to the point, by Toshiba, to whom they were never communicated, hence 801(d)(2)(B) is unavailing. Our discussion in the text will be limited to 801(d)(2)(C) & (D).

tion which we note is that Yajima had absolutely no authority over export matters. Any reference to export matters in his diaries was beyond the scope of his employment, hence excludable.

The other problems to which we have adverted are far more troublesome. As we have seen in our discussion of the law, Part II-C-2 *supra*, an admission is, by definition, a statement which meets the fundamental requirement of F.R.E. 801(a)(2) that the "statement" be "an oral or written assertion, or "nonverbal conduct of a person if it is intended as an assertion."[105] The putative "statements" at issue are the diary entries. We are not dealing in any respect with oral utterances or nonverbal conduct, so that the question is whether the diary entries are intended as written assertions.

We have explained above that the party proffering the evidence has the burden of establishing that what it is proffering is in fact an assertion. In general terms (see discussion *infra)*, we find that plaintiffs have not met that burden here. This conclusion stems from the nature of the diaries which we have described. One cannot tell from reading the diaries what Mr. Yajima intended, whether he was making an assertion or relating the assertion of someone else, or relating what he thought someone else said or what he thought someone else thought or

[105] As we have also noted at p. 1242, *supra*, defendants have argued most persuasively that the kinds of entries which Yajima made in his diaries are not what are generally considered admissions within the meaning of F.R.E. 801(d)(2). We refer here to the fact that we are dealing with recordation of amorphous statements or thoughts attributable to no one and not communicated or apparently intended to be communicated to anyone. The conventional notion of an admission, *i.e.* a declarative utterance of the person making the statement, hardly seems sufficiently elastic to include under its umbrella someone's diary entry about what someone else *may* have said or thought without any explanation of the diarist's source. How can such an "animal" be used as a "statement of a party opponent"? Notwithstanding our rhetorical question, and for the reasons set forth in Part II, *supra*, we have come to the conclusion that under the structure of the Federal Rules of Evidence such diary entries could conceivably be admissions against Yajima's employer, Toshiba Corporation, if they meet the definition in F.R.E. 801(a) of a "statement."

what someone told him someone else said or thought, et cetera. While plaintiffs might have illuminated this area of the case had they taken the deposition of Mr. Kamakura or any of the scores of people who attended Tenth Day Group meetings, because of their calculated trial strategy, they did not.

We have couched our statement that the plaintiffs have not met their burden of establishing the diary entries as assertions in "general terms". Although we have read the diaries several times and are reasonably confident that this conclusion applies across the board, by this locution we refrain from making a categorical declaration (or holding) which applies to every passage or entry in the diaries. For reasons to be explained in our opinion addressing the conspiracy summary judgment motions, such a passage by passage analysis is unnecessary. We are satisfied, however, with respect to any supposed "export references," all of which we have examined, that plaintiffs have not met their burden of establishing the existence of an assertion, hence none of those so-called references are admissible as admissions of Toshiba.

As we pointed out in summarizing plaintiffs' foundational approach with respect to the diaries, all of the diaries and the material contained therein are proffered as accurate accounts of what transpired at meetings of the Tenth Day Group and other allegedly conspiratorial groups mentioned therein. Plaintiffs from time to time have argued their various diary passages are not offered to establish their truth or to establish Yajima's belief in their truth, in either of which cases they would, if the necessary foundation were established, qualify as assertions, but rather that they are introduced merely to demonstrate that they were made, *i.e.* that Yajima wrote the entry.[106] In such event however the diary entries would be inadmissible under F.R.E. 401 because they would be irrelevant to the litigation. Alternatively, their probative value would be so slight that it would be far outweighed by the

[106] Plaintiffs are not consistent in their advocacy, and seem to assert whatever position they think will allow any of the diary passages in.

danger of unfair prejudice, confusion of issues, misleading the jury or by considerations of undue delay and waste of time. F.R.E. 403.[107]

G. *Statements Against Interest*

Although plaintiffs have met the unavailability requirement of Rule 804(b)(3)—Mr. Yajima is dead—the diaries nonetheless fail to meet the other facets of the statement against interest exception. Preliminarily, we note that, for the reasons set forth in the preceding sections, the Yajima diary entries are not statements, i.e., assertions within the Rule 801(a) definition of statements which on its face applies to Rule 804(b)(3)'s "statements" against interest. At least, the export references are not.

Beyond this analysis, however, it is even harder for the diary entries to qualify as statements against interest than as mere statements. As has been made clear in the discussion in Part II, *supra*, in order to qualify as a statement against interest the statement must be against the interest of the declarant, i.e., Mr. Yajima, rather than that of his employer, Toshiba Corporation.[108] As we have seen, at times relevant here criminal prosecution and civil actions against alleged corporate offenders in Japan were extremely rare, and such actions against individuals were unheard of. Nonetheless, given the *text* of the Japanese anti-monopoly law, we are not prepared to conclude that Yajima stood no risk of prosecution

[107] We refer here to specific prejudice to Toshiba, confusion, delay, et cetera. Additionally, there is the pervasive problem of treating admissions against one party in a multi-party trial, when all of the defendants are charged with similar acts. Limiting instructions may be useless in such a case, and the F.R.E. 403 problems assume a heightened dimension.

[108] The defendants contend that the diaries are not even statements against the interest of Yajima's corporate employer, but rather are consistent with the defendants' defense in the Six Company Case. We find much to be said for this contention and will discourse upon it at length in our opinion addressing the motions for summary judgment with respect to plaintiffs' conspiracy claims.

as an individual, if in fact the diaries were inculpatory as to him personally. However, we find little or nothing in the diaries to render Yajima personally liable under Japanese law.

One cannot extract diary entries from context and attribute *to Mr. Yajima* any positions ascribed in the diaries to Toshiba, his employer. Because of the cryptic nature of the diaries, and their failure to attribute positions or actions to individuals, there are no utterances of Mr. Yajima as such to consider. The Yajima diaries, for the most part, record the actions of others, not the actions of Mr. Yajima, and some of the reported discussions took place at meetings that Yajima did not attend. Any passages in the diaries reflecting such discussions could not be statements against the interest of Mr Yajima, except insofar as mere recordation of entries could be deemed to be "against interest."

Moreover, under Rule 804(b)(3), the question is not simply whether the statements are against interest but whether any statements attributable to Mr. Yajima were "*so far*" contrary to his interest that a reasonable man would not have made them unless they were true. That test is not met here.

There is an additional and still stronger ground for excluding the diaries under Rule 804(b)(3). For, even if one assumes that Yajima's diaries were objectively against his interest, it is plain that the plaintiffs have not met the important requirements of Rule 804(b)(3) of showing that the declarant *believe* at the time he makes the statements that it is against his interest. There is just nothing in the record to suggest that Yajima, represented by Toshiba counsel when he gave the testimony and protocols, was aware that anything he was saying was contrary to his own interest, nor can such be inferred on this record.

H. *The Residual Hearsay Exceptions*

In view of the foregoing discussion about Mr. Yajima's diaries, and of our extensive discussion in Part II-F, we need not labor long on the admissibility of the Yajima diaries under the

residual exceptions, Rule 804(b)(5), notwithstanding Mr. Yajima's "unavailability."

First, the diaries fail to satisfy the requirements of F.R.E. 804(b)(5)(B), that the statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. While the testimony of Mr. Yajima obviously could not be procured at this time by reasonable efforts since he is deceased, the plaintiffs could have done much to procure evidence about the alleged conspiratorial meetings from other sources, i.e. by taking the depositions of Yajima's business associates and those who were present at the meetings. There are dozens of such people who are available. Plaintiffs' oft-repeated complaint that the witnesses would not remember is but an ipse dixit. There are voluminious materials upon which to base examination. Indeed, it would be a travesty if the plaintiffs were permitted to invoke the residual exceptions when by a calculated litigation strategy they refused to even seek the necessary foundation required by the traditional hearsay exceptions.

There is another and equally compelling reason why the diaries are not admissible: failure to meet the overriding requirements of exceptional guarantees of trustworthiness as required by the Third Circuit in *United States* v. *Bailey*, *supra*. We need not repeat what we have said at such lengths about the diaries. It is enough to say that it has been more than amply demonstrated on the record that the diaries are not trustworthy and, as we pointed out above, the burden of showing trustworthiness for purposes of the residual exceptions is upon the preponent of the evidence. Thus, neither of the requirements, i.e. exceptional guarantees of trustworthiness or high degrees of probativeness and necessity, are present here. For all of the foregoing reasons, and in light of the narrow construction we are obliged to give the residual exceptions under *Bailey*, we hold that Yajima's diaries are inadmissible under 804(b)(5) and 803(24).

I. *Internal Hearsay (Rule 805)*

It is also necessary to subject the content of the diaries to internal hearsay examination. Subject to such scrutiny, vast portions of the diaries would have to be excluded as containing multiple hearsay not subject to any exception to the hearsay rule. In view of our decision to exclude the diaries for other reasons, it is not necessary for us to make a page by page analysis so as to redact them leaving only what is not multiple hearsay. We can however say with confidence that were we to do so such significant portions would be excised that the diaries as a whole would themselves have to be excluded as having been so fragmented as not to give a fair representation of anything, even if they did theretofore.

IV. *The Yamada Diary, DSS 51*

A. *Introduction*

The Yamada Diary is a notebook into which Noboru Yamada, Department Manager of the Electric Applicance Department, Consumer Products Division of Hitachi, Limited, made certain entries during the period from (approximately) August 1965 to November 1965. It was seized during the JFTC raid upon the offices of Hitachi Ltd. on November 8, 1966. Hitachi produced this notebook to plaintiffs in the course of discovery in these proceedings. At that time, the document was identified by document identification numbers HJ 50016 through HJ 50054.

Plaintiffs offer the Yamada diary in evidence against all defendants. Plaintiffs claim that it is authenticated under F.R.E. 901(a), 901(b0(4), 901(b)(9), and 902. They offer it as a business record under F.R.E. 803(6), as an admission of Hitachi, Limited, under F.R.E. 801(d)(2), as a present sense impression under F.R.E. 803(1), as a declaration against interest under F.R.E. 804(b)(3) and as admissible under the residual hearsay exceptions F.R.E. 802(24) and 804(b)(5). In general terms plaintiffs offer the Yamada notebook as an authentic account of what took place at the group meetings which Mr. Yamada purportedly attended.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

Plaintiffs' proffer of Yamada's notebook, as well as those of Yamamoto, Okuma, and Tokizane, considered *infra*, is based upon the same types of matters that they offered to lay foundation for the Yajima notebooks. Plaintiffs describe the common bases as follows:

(1) Identification of the diaries in the (respective) interrogatory answers of the diarist's employer as its response to those interrogatories.[109]

(2) The "pattern of cross-authentication" which exist among the DSS 48-98, in which various persons identify entries in documents.[110]

(3) The "confirming testimony" which establishes the trustworthiness of the JFTC material.[111]

Plaintiffs also rely across the board upon "a pattern of reporting the conduct of the meetings to both superiors and subordinates," the fact that the notebooks are "business-related" and upon the lawful JFTC seizure of the diary from the Hitachi premises.

In addition to these factors, plaintiffs also rely upon the following:

(1) Counsel for the Hitachi defendants have indicated that there was "no reason to believe that it was not Mr. Yamada's diary."

(2) The "chop" or seal of Mr. Yamada has been affixed to one of the pages of the diary (HJ50034).

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[109] The Yamada diary was identified in answers to interrogatories filed by Hitachi, Ltd. and Hitachi Kaden.

[110] For example, selected passages in the Yamada notebook (DSS 51 at 50017) are said to parallel selected passages in the Yamamoto notebooks (DSS 52 at 50066). DSS 48-98 includes the diaries, protocols, and testimony.

[111] Testimony by Mr. Adachi of Hitachi before the JFTC (DSS 64 at MJ 1925-1) is said to confirm entries in Yamada's notebooks (DSS 51 at 50017).

(3) The Yamada diary appears in the JFTC investigator's list of evidence (DDS-93), which plaintiffs claim is an official record of the JFTC.

(4) One or more individuals named Yamada are identified in Hitachi, Toshiba, and Sanyo Answers to Interrogatories (Plaintiffs' FPS, App. A. at 423, 480, 485) as having attended meetings of the MD Group and the Market Stabilization Council.

(5) Entries in the Yamada diary are of the sort which might be expected by one in Mr. Yamada's high position, (*i.e.*, general manager of the Yokohoma works and later Department Manager, Electronic Appliance Department Consumer Products Division), thus indicating the authenticity of the diary.

(6) There is a pattern of reporting in the notebook congruent with that of other diaries.

C. *Defendants' Response*

(1) The document was produced to plaintiffs in response to a Rule 34 request, not a Rule 33(c) proffer.

(2) Hitachi's interrogatory answers do not establish in any way either its authenticity or business record status.

(3) Other than a reference in the JFTC list of evidentiary materials (DSS-93), which is of dubious admissibility, there is no information in the record regarding the document.

(4) No evidence has been presented as to when or for what purpose Mr. Yamada's seal was attached to *one* page of the Yamada document.

(5) Entries are essentially illegible and unintelligible.

(6) Mr. Adachi's testimony before the JFTC merely elucidates a few figures in the Yamada diary and does nothing to authenticate the diary.

(7) Validation of the Yamada diary by comparison of certain entries therein to certain entries in the Yamamoto diaries

is impermissible unless the Yamamoto diaries have first been authenticated, and even if the Yamamoto diaries were authenticated, similarity in entries could have resulted from information which was derived from a common third-party source.

(8) Yamada is a common Japanese surname and the persons named "Yamada" who are identified in various defendants' answers to interrogatories as having attended various group meetings are not necessarily the same as Noboru Yamada of Hitachi, Ltd., since at least four other persons named "Yamada" are mentioned in the record.

(9) No evidence is in the record to indicate that Noboru Yamada attended any of the meetings noted in the Yamada diary.

(10 Plaintiffs have presented no evidence to demonstrate that Mr. Yamada acted under a duty to record any of the information in the diary.

(11) Plaintiffs have presented no evidence as to what periods of time may have elapsed between when Mr. Yamada learned certain information and when he recorded it in his diary.

(12) There is no evidence of systematic checking or of a regular or continuous habit on Mr. Yamamoto's part in marking entries in his notebooks relating to group meetings.

(13) Mr. Yamada is alive and well and still employed by Hitachi and available for depositions, but has not been deposed by plaintiffs.

D. *Authentication*

Although the point is very close, we find Mr. Yamada's diary to be authenticated for much the same reason as we found Yajima's diaries authenticated. We rely in this regard on the identification of the documents in answers to interrogatories

and its production by Hitachi[112]; the presence of Mr. Yamada's "chop" on one of the pages of the diaries; the apparent acknowledgement of the authenticity of the diary in Mr. Adachi's testimony before the JFTC,[113] and the circumstances of seizure of the diary. We believe that these factors taken together satisfy the *Goichman* standard.

E. *The Business Records Exception*

Yamada's diary does not qualify as a business record under F.R.E. 803(6) for the reasons set forth at length in our discussion of Yajima's diaries. We shall not burden the record by rescribing virtually all of the reasons for nonadmissibility advanced there, and we simply incorporate by reference our rulings. In capsule form, we note the following. First, the plaintiffs have failed to adduce any evidence of routine practice or systematic checking or of any habit of precision or regularity on Mr. Yamada's part in connection with his diary entries. Second, this diary is worse than a "hodge podge." We have read it in its entirety (in English translation of course) and can certify that there is hardly a line much less a page which is intelligible—that is to anyone other than Mr. Yamada, assuming *he* could understand it. To call this document cryptic would be extremely charitable. Third, there are the same problems of lack of evidence of first hand knowledge and a duty to report. Fourth, there is no evidence in the record as to what periods of time may have elapsed between when Mr. Yamada learned certain information and when he recorded it in his diary. Moreover, for the foregoing reasons and because of the character of the diary there are trustworthiness problems of such dimension as to render the diary inadmissible under the 803(6) pro-

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[112] Defendants have asserted that the document was produced in response to a Rule 34 request, not a Rule 33(c) proffer. This would make some difference on the question of authentication but not enough to affect the outcome here.

[113] Mr. Yamada did not testify before the JFTC and gave no protocol. We do not ignore the defendants' contention that Mr. Adachi's testimony before the JFTC merely elucidates one minor facet in the Yamada diary; that alone would not be enough but it does not stand alone.

viso. To repeat what we said in discussing Yajima's diaries, a document which is unintelligible cannot be trustworthy. We have thus essentially accepted defendants' contentions about the Yamada diary and its admissibility under Rule 803(6).[114]

In addition to the reasons akin to those which required exclusion of Yajima's diaries, there are other reasons preventing the Yamada diary from coming in as business records. There is no evidence in the record as to Yamada's presence at any of the Tenth Day Group meetings. Plaintiffs seem to believe that the congruence between entries in Yamada's diary and entries in the other diaries is sufficient to establish such a presence and also to establish the admissibility of the diary as a business record under 803(6). For the reasons explained above that is incorrect. Moreover, unlike Yajima, Yamada is alive and well and available for depositions but they have never been taken. Plaintiffs have had an opportunity to lay foundation for admissibility—that is what lawyers usually do in cases before us—but have passed it by.

F. *Admissions, The Other Hearsay Exceptions, and Internal Hearsay*

The Yamada diary and the entries within it do not qualify as admissions for the same reason as the Yajima diaries: lack of foundation. Rather than repeat what we said above we incorporate it by reference and add the overall comment that, as in Yajima's case, there is insufficient information in the record for us to conclude that the entries in Yamada's diary constitute assertions, or what they assert. And if they are not proffered as assertions they are irrelevant.

The diaries do not qualify as statements against interest for the same reasons as the Yajima diaries: the absence of assertions, the absence of identifiable statements of Yamada which would be personally inculpatory against him, and plaintiffs' failure to produce evidence from which we could infer that Yamada was conscious that any statements were against his interest. In addition, plaintiffs have failed to meet the unavailability requirement, for Mr. Yamada, unlike Mr. Yajima, is alive and well and has been available for a deposition.

[114] As we have explained above, production of the document, even pursuant to Rule 33(c), does not establish it as a business record. Equally unavailing is the supposed pattern of reporting which though not established would not qualify a document as a business record in any event. The fact that entries are business related or that Mr. Yamada had a high position in the company or that an occasional entry was verified during JFTC testimony does not help the plaintiffs either.

The residual exceptions are unavailing because of the utter lack of trustworthiness of the diary on its face. Additionally, Mr. Yamada is available for depositions; hence the diaries themselves are not more probative on the point for which they are offered than other evidence which the proponent could procure through reasonable efforts. We understand of course that the events at issue occured many many years ago, and that plaintiffs therefore argue that the diary is the best available evidence of what occurred. The plaintiffs have failed to establish that this is so, however since they have not made the slightest attempt to take depositions. Rather than being meaningless, we think that a deposition might have been very fruitful inasmuch as the deponent/declarant could have been examined on all of the diaries, testimony, protocols and the other hearsay materials. As with the Yajima diary, this is not the stuff of which residual exceptions are made.

It is also necessary to subject the content of the diaries to internal hearsay examination. As with the Yajima diaries, vast portions of the Yamada diary would have to be excluded as containing multiple hearsay not subject to any exception to the hearsay rule. As with the Yajima diaries, the deletion of internal hearsay would result in the excision of such significant portions that the diaries as a whole would themselves have to be excluded as having been so fragmented as not to g[i]ve a fair representation of anything, even if they did theretofore.

V. *The Yamamoto Diaries, DSS 52-54*

A. *Introduction*

The Yamamoto diaries, into which Mr. Mamoru Yamamoto of Hitachi, Limited, purportedly made certain entries during the period of approximately October of 1964 to July of 1966, were seized by JFTC during the course of the Six Company Case. Hitachi Ltd. produced these notebooks to plaintiffs during discovery in these proceedings. At that time, these documents were identified by document identification numbers HJ 50055 through HJ 50160 and HJS 60002 through HJS 60010.

Plaintiffs offer these diaries in evidence against all defendants. More specifically, plaintiffs claim these diaries are authentic under F.R.E. 901(a), 901(b)(4), and 901(b)(9). They are offered as admissions of Hitachi, Limited, under F.R.E. 801(d)(2), as present sense impressions under F.R.E. 803(1), as business records under F.R.E. 803(6), as declarations against Mr. Yamamoto's interest under F.R.E. 804(b)(3) and under the residual exceptions, F.R.E. 803(24) and 804(b)(5). Plaintiffs offer the diaries as authentic accounts of what took place at the group meetings which Mr. Yamamoto purportedly attended.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The Yamamoto notebooks were identified in answers to the interrogatories filed by Hitachi Ltd.

(2) In his protocol before the JFTC (DSS-86), Mr. Yamamoto identified the notebooks, which are in turn identified in the JFTC investigator's list of evidence (DSS-93) as his own.

(3) In his testimony before the JFTC (DSS-64), Mr. Adachi testified concerning two entries in the Yamamoto notebooks, and raised no challenge to the authenticity of the notebooks at that time.

(4) Mr. Yamamoto put his business address into his notebooks, and kept his notebooks at his desk, for that is where the JFTC investigators found (and lawfully seized) them

(5) In his protocol before the JFTC, (DSS-64), Mr. Yamamoto stated that he went to some meetings of the Tenth Day Group.

(6) As to group meetings which he did not attend, Mr. Yamamoto states in his protocol before the JFTC (DSS-64) that Mr. Adachi would communicate information concerning these meetings to Mr. Yamamoto within a week of occurrence of the meetings, and that Mr. Yamamoto would promptly record all information relevant to his business responsibilities.

(7) It can be assumed from the corporate structure of Hitachi, Ltd. that Mr. Yamamoto was receiving regular timely reports concerning group meetings which he did not personally attend.

(8) Dates of group meetings noted by Mr. Yamamoto correspond with dates of which plaintiffs are aware from other evidence in this litigation, thus corroborating the accuracy of Mr. Yamamoto's notes.

(9) Mr. Adachi did not "embellish" any of the reports he made to Mr. Yamamoto concerning meetings which Mr. Yamamoto did not attend because he knew the information had to be reliable enough for Mr. Yamamoto to act upon it.

(10) All entries in the Yamamoto notebooks are business-related.

(11) The contents of the Yamamoto notebooks must have been communicated at least at Mr. Ueno, for he signed the receipt when the JFTC investigators seized the notebooks.

(12) Mr. Adachi ratified the contents of the Yamamoto notebooks because, if Mr. Yamamoto's practice in writing this information down were against company policy, Mr. Adachi would have stopped him from acting as he did.

(13) One diary (DSS 53) bears the Hitachi logo, with the legend "1964 Diary" and under that "Hitachi Kaden, Inc." and under that "Hitachi Installment Sales, Inc." Yamamoto gives

his name and for his address he gives "TV Dept., TV. SEC," which identifies the diary as a business notebook, not a personal notebook.

C. *Defendants' Response*

(1) The Yamamoto notenooks were produced to plaintiffs in response to a Rule 34 request, not a Rule 33(c) proffer;

(2) The authenticity of the Yamamoto notebooks was not challenged before the JFTC because the notebooks were not introduced as substantive evidence.

(3) Mr. Adachi's testimony before the JFTC relating to entries in the Yamamoto notebooks relates not to the authenticity of the notebooks, but to the inaccuracy of figures recorded in the notebooks.

(4) Correlation of dates recorded for group meetings recorded in the Yamamoto notebooks with dates noted in other items of proffered evidence does nothing to satisfy the requirements of the Federal Rules of Evidence.

(5) Many dates of group meetings which took place in the period covered by the Yamamoto notebooks are not noted therein, which fact indicates a lack of regularity in creation of these entries.

(6) Plaintiffs have presented no evidence that Mr. Yamamoto regularly put into his notebook information concerning group meetings that Mr. Adachi had personally attended, as opposed to meetings which Mr. Yamamoto or Mr. Adachi may have learned of from unidentified third persons.

(7) There is no evidence of systematic checking or of a regular or continuous habit on Mr. Yamamoto's part in making entries in his notebooks relating to group meetings.

(8) Mr. Yamamoto states in his protocol before the JFTC (DSS-86) that Mr. Adachi added his own ideas and accounts of Tenth Day Group Meetings to Mr. Yamamoto's.

(9) There is no evidence indicating what Mr. Yamamoto's source was for information regarding meetings of any group other than the Tenth Day Group, and neither Mr. Yamamoto nor Mr. Adachi ever attended a single meeting of some of the groups referenced in the Yamamoto notebooks.

(10) The supposition that a document is found in a business office does not establish it as a business record, nor does the fact that portions of the document are business-related.

(11) There is no evidence that the contents of these notebooks were ever communicated to anyone, and the fact that Mr. Ueno signed the JFTC receipt does not establish that he read the notebooks.

(12) Entries in the Yamamoto notebooks are essentially unintelligible, and it is impossible to determine where opinion stops and the information, if any, begins.

D. *Discussion*

We need not dwell long on the Yamamoto diaries because we agree essentially with defendants' contentions. Accordingly, the diaries must be excluded for the reasons set forth in our discussion of the Yajima and Yamada diaries. They are authenticated by virtue of their mode of seizure and production, by Mr. Adachi's brief testimony, by Mr. Yamamoto's act of putting his business address in the notebooks, and by his reference to the diaries in his protocol. However, they must be excluded as hearsay because they have not satisfied any of the exceptions.

First, they cannot qualify as business records because they suffer from the same vices as the Yajima and Yamada diaries. They are more similar in character to Yajima's diary then to Yamada's; hence we incorporate by reference our discussion of the admissibility of Yajima's diary under Rule 803(6) including our comments upon plaintiffs' proffered foundation. However, Yamamoto's diaries also have problems of their own. The principal additional problem with the Yamamoto diaries is that it is plain (and plaintiffs concede) that Mr. Yamamoto never

attended many of the meetings whose events are allegedly recorded in the diaries. Indeed, Yamamoto stated in his protocol that his diaries were founded *entirely* on hearsay:

> These two notebooks are mine and the content of the discussions at the meetings of the Tenth-Day Group and TS Group was written by me from what I heard from Vice-Director of the TV Department Adachi. It was when I went to Vice-Director Adachi's desk or when he came to my desk that he talked to me about the discussions at the meetings. This was either the next day or within a week following the date of the meeting. He talked to me looking at his memo from the meeting, and he added his own ideas. I have written only the parts of the meeting which related to me in my notebooks.

The hearsay source of this diary would never have been apparent but for this statement. That is another reason why the absence of testimony concerning the diary entries relied upon by plaintiffs renders the entries extremely suspect.

It is thus known with respect to at least some of these meetings that they were attended by Mr. Adachi, who would communicate information concerning these meetings to Mr. Yamamoto. Plaintiffs submit that Mr. Adachi would communicate the information to Mr. Yamamoto within a week of the occurrence of the meetings and that Mr. Yamamoto would thereupon promptly record all information relevant to his business responsibilities. They assert that the correspondence of dates of group meetings noted by Mr. Yamamoto with dates of which the plaintiffs are aware from other evidence of the litigation corroborates the accuracy of Mr. Yamamoto's notes. They submit that Mr. Adachi did not embellish any of the reports he made to Mr. Yamamoto concerning meetings which Mr. Yamamoto did not attend because he knew the information had to be reliable enough for Mr. Yamamoto to act upon it in his official duties. And they conclude that Adachi ratified the contents of the notebooks because if Yamamoto's practice in recording this information were against company policy, Mr. Adachi would have stopped him from doing so.

These contentions are all very interesting and might be convincing had plaintiffs established them by taking the deposition of either Yamamoto or Adachi, both of whom have always been available. In the absence of such evidence, plaintiffs' contentions must fail. There is no evidence that Mr. Adachi or anyone else ever saw the diary. Plaintiffs have presented no evidence that Yamamoto regularly put into his notebook information concerning group meetings that Adachi had attended as opposed to meetings which Yamamoto or Adachi may have learned of from unidentified third persons. In addition to the fact that Adachi added his own ideas to his accounts of the Tenth Day Group meetings to Yamamoto, the diary contains entries regarding the meetings of groups (the TS Group and the Palace Group) which neither Yamamoto nor Adachi ever attended.

There was, alas, no evidence of systematic checking or of habits of precision or of a regular continuous practice on Yamamoto's part in making entries in his notebooks relating to group meetings. The regularity problems are further demonstrated by the fact that within the time frame of 21 meetings of the Tenth Day Group referenced in Appendix B of plaintiffs' FPS, both Yamamoto diaries contain a total of only four references to the meetings. That fact hardly supports a claim of regularity of either attendance or of reporting.

The diaries contain the same methodological problems that the Yajima diary contains in terms of being similarly cryptic and erratic. There are likewise numerous unintelligible entries and it is impossible to sort out opinion from fact. Notwithstanding plaintiffs' suggestion, correlation of dates recorded for group meetings recorded in the Yamamoto notebooks with dates noted in other items of proffered evidence does not qualify the diaries as business records within the meaning of the F.R.E. Neither does it matter that the diaries relate to business matters. For the same reasons we mentioned in the

case of the other diaries, there are overwhelming indicia of the unreliability of the diaries.[115]

We need not dwell further on the Yamamoto diaries. For the very same reasons set forth in our discussion of the Yajima and Yamada diaries and the preceding discussion with respect to the Yamamoto diaries, neither the diaries nor the individual entires within them can qualify as an admission against Hitachi, or as statements against interest, nor can they qualify under the residual exception. Moreover, they are afflicted by the same internal hearsay problems as we have noted with respect to the diaries of Yajima and Yamada.

VI. *The Okuma Diary, DSS 55*

A. *Introduction*

The Okuma diary is a notebook into which Mr. Mshizo Okuma, formerly assistant manager of the radio and television section and later assistant director of the sales department of Melco, made certain entries. While the diary is lengthy, we have before us only the three pages thereof which have been translated. The diary was seized by the JFTC during the course of the Six Company Case. Melco produced the diary to plaintiffs during discovery. At that time, the translated pages of the diary were marked by document identification numbers 2198 to 2200, although as will be seen, Melco claims that the plaintiffs have misrepresented the diary by marking the pages out of their correct order. Plaintiffs offer the notebooks in evidence against all defendants on essentially the same basis as we have noted in connection with the previous diaries. They offer the diary pages as containing authentic accounts of what took place at the group meetings which Mr. Okuma purportedly attended.

[115] Mr. Adachi's testimony before the JFTC relating to entries in the Yamamoto notebooks itself points out the inaccuracy of certain figures recorded therein.

B. *Plaintiffs' Foundation*

(1) The Okuma diary was identified via Melco's supplemental answers to interrogatories of NUE, dated May 15, 1975, in which Okuma was identified as assistant to the manager of the Consumer Product Sales Department of Melco. The diary was also identified in Melco's response to plaintiffs' interrogatories to defendants relating to the existence, location, and destruction of documents.

(2) Okuma identified his diary in his protocol given to the JFTC, stating that it was his diary and specifically referring to a February 16th meeting of the Tenth Day Group which he attended. Moreover, he identifies the February 16th entry as being *written at* the Tenth Day Group. In the protocol, Okuma also confirms a certain diary entry.

(3) In his testimony given under oath before the JFTC, Okuma confirms attendance at Tenth Day Group meetings, and makes (only) one correction in the protocol. Okuma was not confronted with his diary during his JFTC testimony, but plaintiffs assert that in light of the fact that he was testifying and made a correction to the protocol, he could have corrected the diary had he wished.

(4) The diary was lawfully seized by the JFTC from Melco's premises and is so identified in DSS 93.

(5) The statement on the top of the diary, namely, "Confirmation of the proceedings of the previous minutes" confirms the fact that minutes were kept.

(6) Okuma made one correction in the diary, "thus confirming the others are accurate."

(7) Okuma identified one of the entries as an entry he wrote down while talking to the factory, thereby establishing it as a business entry.

C. *Defendants' Response*

Melco asserts generally the same objections to the authenticity and admissibility of the diary under exceptions to the hearsay rules as do Toshiba and Hitachi in the discussion above. We add only the points especially stressed by Melco. First, Melco asserts that this was a personal diary intended for Okuma's eyes only. Melco contends that the diary is not authenticated by Okuma's testimony or protocol because the testimony does not mention the diary and because all of the materials taken together are "confusing, internally inconsistent, and meaningless without explanatory testimony by Okuma himself, which the plaintiffs consciously elected not to seek as a matter of trial strategy." Melco highlights its claim that the unexplicated diary is untrustworthy by demonstrating that the documents submitted by plaintiff are out of chronological order and would be confusing and incomprehensible to the trier of fact. More specifically, Melco asserts that the documents which were originally legended as Melco documents number 20583 and 20584 were reversed by plaintiff in their numbering, creating the impression that certain events took place when they in fact did not.

D. *Discussion*

We shall not dwell on the Okuma diary because our analysis of its admissibility *vel non* essentially tracks our previous analysis. The Okuma diary is authenticated against Melco by virtue of its mode of seizure and production and reference in answers to interrogatories and in Okuma's protocol. However, Melco's interrogatory answers and Okuma's protocol are both admissible only against Melco. As against all other defendants, there is insufficient authenticating evidence even to meet the prima facie standard of *Goichman, supra*. As a result, the Okuma diary is authenticated only against Melco, and is inadmissible against all other defendants because it is not authenticated by evidence which is admissible against them.

The diary cannot qualify as a business record because it suffers from the same vice as the other diaries, the lack of

evidence of systematic checking or of a regular continuous habit on Okuma's part in making entries in his notebooks relating to group meetings. There is a trustworthiness problem caused by plaintiffs' submission of misordered pages. Moreover, the few pages of the diary that have been translated are punctuated with illegible entries (in English), the correctness of whose translation is challenged.[116] Other problems include attribution of statements to various companies without explaining who the speaker was or explaining whether this was merely what the diarist's impression was of the companies' position; a nine-page gap between the first and second pages proffered by the plaintiffs; and the presence of cryptic narrative and chart-like entries which it would take the testimony of the diarist or someone present at the meeting to explain. The diary entries plainly are not admissible as business records. Neither are the diaries nor portions thereof admissible under 801(d)(2) or 804(b)(3) nor 803(6) nor 803(24) or 804(b)(5)—all for the same reasons as heretofore expressed.

VII. *The Tokizane Diary, DSS 56-57*

A. *Introduction*

The Tokizane diary is a notebook of approximately 80 pages, comprising entries purportedly made by Hayata Tokizane, an employee of Matsushita Electric Industrial Co., Ltd. ("MEI"). At the time that the diary entries were allegedly made (between March and April, 1965) Mr. Tokizane was the Director of the Television Division of MEI. He was also a director of MEI from 1967 to 1971 and Managing Director from 1971 to 1974. Only two pages of the diary were submitted to the Court, document numbers MJ3972 and MIH20080.

Plaintiffs offer the Tokizane diary in evidence against all defendants. More specifically, plaintiffs offer this diary as a business record under F.R.E. 803(6), as an admission of MEI

[116] We do not deem pages which plaintiffs have not bothered to translate to be candidates for admission.

under F.R.E. 801(d)(2), as a declaration against the interest of Mr. Tokizane under F.R.E. 804(b)(3), and under the residual hearsay exceptions, F.R.E. 803(24) and F.R.E. 804(b)(5). Substantively, plaintiffs offer the diary as evidence that Matsushita and Sony conspired to fix the price of 9″ color transistor TV sets at 39,800 yen, and that there was a meeting of the Palace Group on March 23, 1965, where a decision was made concerning the price of color TV's.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Hearsay Rules*

(1) MEI answers to interrogatories identify Mr. Tokizane as the director of the television division of MEI from 1964 to 1968; as such, he was the direct superior of the general manager of the television department of MEI, the immediate superior of the general manager of the transistor department of MEI, and the immediate superior of the general manager of the color television department of MEI.

(2) The first part of the diary was produced by the Matsushita defendants, and is referred to by them in their correspondence and in their Answers to Interrogatories Set No. 2, Interrogatories 8, 42, and 44.

(3) The diary contains entries about employees' wages, new employees, and a meeting concerning a press release for new products, *i.e.* business related matters.

(4) The diary was an exhibit in the "Six Company Case," and part of the record in that proceeding (DSS 93).

(5) The diary contains a March 31 entry about a meeting at the "Head Office" involving the President, Vice President and Managing Director who discussed color TV prices, transistor TV's, that the price of a 9″ television receiver would be 39,800 yen, and that the president would inform Sony to that effect. The diary also contains an April 1 entry indicating "telephone from President about the Sony matter." Plaintiffs claim that this entry, in conjunction with the March 31 entries, indicates that Matsushita and Sony set the price of 9″ transistor color TV's at 39,800 yen.

(6) The April 5 entry refers to a phone call from the "Chairman" (but does not specify which chairman) concerning the decision of the Palace Group on color prices. This decision was purportedly made at a Palace Group meeting on March 23, 1965, since Appendix B to Plaintiffs' FPS and document MJ2823 (the JFTC investigator's statement of the case, DSS-94) lists a Palace Group Meeting on March 23, 1965.

(7) Despite the fact that the diary entries do not mention the year, they do indicate that April 5 was on a Monday, and an examination of a perpetual calendar reveals that the year must be 1965.

C. *Defendants' Response*

(1) There was no testimony or protocol by Mr. Tokizane in the Six Company Case record. No one else in the Six Company case referred to Mr. Tokizane's diary. The present case has no deposition dealing with Mr. Tokizane. There was no foundation laid for admissibility of the diary in the JFTC proceeding. Consequently, other than the bare diary itself, there is no explanation of what the diary means, how it was prepared, and for what it was used.

(2) Since no other source sheds light on the meaning of the diary, it is impossible to relate any individual entry in the diary to any other entry. For example, nothing in the diary indicates that the 9″ T.R. price of 39,800 yen in the March 31 entry relates to the "telephone from president" entry of April 1, or the "Chairman phone call entry" of April 5, or any other entry. The attempted connection between the 9″ television receiver price of 39,800 yen, in the March 31 entry, with the April 5 entry concerning the Palace Group decision on color prices is impossible, since 39,800 yen is too low a price for a color TV.[117]

(3) The entries do not purport to have anything to do with an export conspiracy, nor do they say that there was any

[117] Plaintiffs have now conceded the mistake and stated that the reference should be to a monochrome set.

agreement reached in the sense of parallel pricing conduct. Consequently, the jury cannot be permitted to speculate as to what these meaningless entries refer to.

(4) Plaintiffs' contention that the March 31 and the April 1 entries indicate that Sony and Matsushita together set the price of 9" color transistor TV sets at 39,800 yen is clearly erroneous, since at the alleged time of the diary entries (April 1965) Sony was not exporting color TV sets. Also, the price of 39,800 yen was not comparable to Sony's prices for those models. Furthermore, the diary entries nowhere state that Sony and Matsushita fixed prices, merely that the president will inform Sony about *something*, and it is impossible to infer a price-fixing agreement involving Sony from these cryptic comments in the diary.

(5) It is uncontested that Mr. Tokizane never attended any of the various group meetings. Thus, any references to discussions at the Palace Group meetings are, at best, multiple hearsay.

(6) There is no showing in the diary as to what year the entries were made. References in other documents that meetings took place in 1965 does not shed light on the year that *this* diary was made.

(7) If the diary was necessary to Mr. Tokizane's business, it would have been written in a comprehensible manner.

D. *Discussion*

We have spent much time in dealing with the diaries. This has been necessary because of the great scaffolding which plaintiffs have erected on the basis of random entries therein, a scaffolding which collapses because of the non-existence of foundation. It is time to move on to other matters and so we shall simply note that we agree with defendants' contentions and conclude that the Tokizane diary is not admissible under any of the exceptions to the hearsay rules for essentially the

same reasons as the other diaries.[118] Plaintiffs make much of Mr. Tokizane's high position within Matsushita. That does not affect admissibility. This document is as cryptic as can be and we are not about to let the trier of the fact (aided of course by some helpful suggestions of their friendly plaintiffs' counsel) speculate as to what it means on the basis of selected bits and pieces.

At the hearing plaintiffs' counsel argued that even if the document was inadmissible, it would still be relied upon for "corroboration." We know of no authority for such a proposition, and suggest that it reflects the bankruptcy of plaintiffs' evidentiary case.

VIII. *JFTC Testimony, DSS 58-74*

A. *Introduction*

During the Six Company proceedings, a total of 17 different witnesses testified before the JFTC Hearing Examiners.[119] The names of the witnesses are as follows:

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[118] We do find it authenticated against MEI, but not against any other defendant because of the absence of authenticating evidence which is admissible against the other defendants.

[119] All of the testimony that was presented during the Six Company Case was discussed together at the evidentiary hearings, hence we shall discuss all of the testimony together herein.

DSS Number	Witness	Company	Document Number
DSS 58	Tsuruta	MEI	TJ 2144-2218
DSS 59	Oshima	MEI	TJ 2509-2551
DSS 60	Ta Fujio	MEI	TJ 1468-1523
DSS 61	Tsu Fujio	MEI	TJ 4416-4464
DSS 62	Hirano	Sanyo	TJ 2014-2143
DSS 63	Yoshioka	Sanyo	MJ 2232-2264
DSS 64	Adachi	Hitachi	MJ 1893-1986
DSS 65	Yamamoto	Hitachi	TJ 1408-1467
DSS 66	Nishi	Hitachi	MJ 2652-2661
DSS 67	Okuma	Melco	MJ 1987-2044
DSS 68	Kihara	Melco	MJ 2527-2547
DSS 69	Kamakura	Toshiba	MJ 2044-2087
DSS 70	Yajima	Toshiba	MJ 2098-2160
DSS 71	Kawahara	Toshiba	MJ 2662-2670
DSS 72	Ogawa	Sharp	MJ 2161-2187
DSS 73	Ogawa	Sharp	MJ 2617-2632
DSS 74	Iue	Sanyo	MJ 2671-2678

The six defendants were jointly represented by three counsel, identified in the translations as "surrogates." The vast bulk of the interrogation of the witnesses was conducted by these counsel. Some questions were also put to the witnesses by the JFTC Hearing Examiners and occasionally questions were put by the investigators. The subject matter of the testimony related to business practices of the six companies, with emphasis upon their pricing policies, and to activities at meetings of the Tenth Day Group at which there were discussions of "bottom prices," predicted consumer demand, and of the wholesale, retail, and rebate margins operative in the manufacturers' distribution chains. Virtually all of the testimony concerned the Japanese domestic market, although there is an occasional random reference to exports.

Not all of the testimony is inculpatory of a domestic price-fixing conspiracy. Indeed, the testimony is pervaded by denials that any agreements were reached, by testimony that the companies did not tell each other the truth at the meetings, and

by contentions that the principal function of the meetings was not the fixing of prices, but the projection of demand. There were occasional references to the diaries, but they did not play a significant role in the testimony. There was no effort to formally authenticate the diaries. We shall not dwell here upon the substantive import of the JFTC testimony, reserving that for the conspiracy summary judgment opinion. Suffice it to say for now that the tenor of the testimony nowhere contains the slightest suggestion that the activities of the defendants were in the nature of fixing an artificially high price in Japan for the purpose of financing a predatory export raid on the American market. Indeed, there is no suggestion of that even in the JFTC complaint. *See* DSS 94.

Plaintiffs offer the testimony of the above-listed witnesses against all defendants in this action. Plaintiffs offer this testimony as prior testimony under F.R.E. 804(b)(1); as statements against interest under F.R.E. 804(b)(3); as party admissions under F.R.E. 801(d)(2); as business records of the JFTC under F.R.E. 803(6); and as admissible under the residual hearsay rules, F.R.E. 803(24) and F.R.E. 804(b)(5). Defendants object on grounds of lack of authentication and hearsay. We turn to a discussion of these issues against the background of our legal discussion in Part II, *supra*.

B. *Authentication*

The proffered documents are copies of the notes of the testimony taken before the JFTC, but without any kind of seal, or certification from the JFTC or its court reporter of its correctness, and without testimony by a witness who has compared the copies with the original. While most of the defendants have not asserted the point, and although plaintiffs express understandable chagrin at the apparent hypertechnicality of the contention, Melco, correctly noting that it is the plaintiffs' burden to authenticate its evidence regardless of what the defendants come forward with, objects to the admission of the

JFTC testimony on the grounds of lack of authentication. The Melco objections are based on the lack of:

1) certification by the JFTC that the profferred copy is a genuine copy of the original;

2) testimony or certification that the typed copy is an accurate transcript of the original handwritten copy;

3) testimony or certification that the examiner accurately reported his notes of the witness' statements;

4) signature or oath by the witness; and

5) certification of a "public document" as required under F.R.E. 902(3) relating to "foreign public documents."

For reasons stated in Part II A-5, *supra*, we view Rule 1005 objections as waived and Rule 80(c) as inapposite. We will consider Melco's objections, however, under the general standards of Rule 901.

The plaintiffs have responded to these objections in several ways. First, they point out that defendants identified the notes of testimony in their answer to "Plaintiffs' [NUE] Interrogatories to Defendant Set. No. 2, Interrogatories Nos. 8, 42-44." Secondly, the plaintiffs note that the transcripts were produced by the defendants in response to plaintiffs' Request for the Production of Documents. Thirdly, the plaintiffs observe that all of the witnesses were called to testify by an attorney who represented all respondents to the JFTC case, and that the witnesses were sworn. Fourth, they note that there is a stenographer's seal on the (copy of the) transcript. Fifth, they point out that the format of all the notes of testimony is the same. Finally, they argue that all the witnesses were employed by the various defendants.

We are satisfied that the plaintiffs have made a sufficient prima facie showing of authentication under Rule 901 by virtue of the factors they have noted, and by virtue of the contents and substance of the transcripts themselves taken in conjunction with circumstances. F.R.E. 901(b)(4).

C. *Admissibility as Former Testimony—Rule 804(b)(1)*

Since we are dealing here with the admissibility of former testimony, we must first consider the terms of F.R.E. 804(b)(1), which we have discussed in Part II.D above. In accordance with that discussion, there are three distinct points we must address in considering the admissibility of the JFTC testimony: (1) unavailability; (2) opportunity and similarity of motive; and (3) the predecessor in interest notion. The latter point is important because the plaintiffs seek to offer the JFTC testimony against all defendants, not just those involved in the Six Company Case, on the grounds that the defendants in the Six Company Case are the predecessors in interest of the other defendants.

1. *Unavailability*

We have explained in Part II-D-1 the principles regarding the requirement of unavailability both in general and as applied to Rule 804(b)(1). For the reasons stated there, we find Yajima unavailable because of his death, and we find the other witnesses who testified before the JFTC unavailable within the meaning of Rule 804(a)(5), for purposes of Rule 804(b)(1) only, because they are beyond the subpoena power of the Court.

2. *Similarity of Motive to Develop The Testimony*

a. *Contentions of the Parties*

We commence our discussion of similar motive by summarizing the positions of the parties. It is more convenient to begin with the position of defendants who in one of their briefs have outlined the differences between the JFTC action and the present action as follows:

	Japan	U.S.
Nature of Action	Investigation by an administrative agency in Japan under the Japanese civil law system with minimal evidentiary rules, including the admission of hearsay evidence.	Private, treble damage lawsuit in the U.S. under the Sherman Act and common law system with evidentiary rules generally excluding hearsay.
Nature of Charge	Whether or not an alleged agreement between Japanese television manufacturers on the suggested retail price resulted in a restraint on the actual prices within Japan.	Whether or not certain Japanese television manufacturers combined and conspired for the purpose and with the intent of predatorily invading the U.S. market by selling at unreasonably low prices in order to drive plaintiffs out of business.
Substantive Law	Whether the alleged agreement on suggested retail prices constituted an "unreasonable restraint of trade" under the Japanese interpretations of the Japanese Anti-monopoly Law (JAL Sections 3, 1(6)). No "per-se" rule under Japanese law.	Whether there was a broad, all-embracing conspiratorial agreement to fix prices and make a predatory invasion of the U.S. market.

Defendants thus contend that the issues are not substantially similar. They argue that in the JFTC proceeding the only issue was "whether respondents had jointly established a suggested retail price, the retailers and wholesalers margins, and the rebate level." In the case at bar, defendants claim the issues are (1) whether "the alleged two year Japanese conspiracy drove the prices of television receivers up and established inordinate profit margins," (2) whether "this domestic conspiracy was an integral part of an alleged export conspiracy involving almost one hundred companies doing business all over the world to create a 'war chest' to finance the sale of CEP's in the United States at artificially low prices"; and (3) whether the JFTC testimony establishes the authenticity of the diaries as business records.

Defendants claim that neither issues (1) nor (2) were involved in the JFTC proceeding. As to issue (3), defendants maintain that there was no motivation in the JFTC hearing to show that the diaries of the declarants were not business records because no similar rules of evidence exist in Japan.

In addition to claiming that there is no similarity of issues between the two proceedings, defendants urge that there is no similarity of purpose for which the testimony is offered and that the circumstances under which the opportunity to develop the testimony arose are not meaningful in light of the present circumstances. In this regard, defendants emphasize the following factors: (1) the unforeseeability to the parties to the JFTC proceeding that there would ensue a subsequent litigation involving additional defendants, some with no operations in Japan, and involving complex allegations of home market *and* export conspiracies; (2) the difference in the natures of the proceedings, *i.e.* an administrative agency hearing under Japanese civil law with minimal evidentiary rules versus a private treble damage lawsuit in the U.S. with more stringent evidentiary rules; and (3) the differences in the sanctions available, *i.e.* a fine of 500,000 yen in Japan (equivalent at the time to 1,388 U.S. dollars) and treble damages of 1.2 billion dollars in the instant case.

Plaintiffs claim that the requirements of similar motive as measured by substantial similarity of issues and purpose are fully met in this case. They deny that any circumstances in the present proceedings have made the opportunity to develop the testimony in the prior proceeding less meaningful. Plaintiffs assert that the testimony given at the JFTC proceedings con-

cerned the issue of a conspiracy to fix prices in the Japanese domestic television market and that "this is the precise issue and purpose for which such testimony is being offered in this litigation." Furthermore, plaintiffs contend that the testimony was offered at the JFTC proceedings on the issue of the authenticity of the diaries and notebooks, again a precise issue and purpose for its being offered here.

In addition, plaintiffs take issue with defendants' contention that there is a requirement that parties to the action in which the former testimony was taken know or should know there was additional pending litigation in which the testimony might be used. Even if there were such a requirement, plaintiffs submit that the parties had reason to believe that civil or criminal lawsuits might follow the JFTC proceeding because the act under which the proceedings was instituted also contained provisions for a private right of action and for criminal sanctions. *See* Part II.E.3, *supra* (quoting Japanese Antimonopoly Law).

Having stated the parties' contentions as to the similarity of motive requirement, we now turn to their resolution.

b. *Similarity of Issues and Purpose*

In order to establish the existence of the alleged unitary conspiracy among defendants, plaintiffs must prove the existence of the conspiracy's component parts and their connection. One element or building block of this theory is an alleged agreement between the six defendants named in the JFTC proceeding to fix prices in Japan. Insofar as that issue was an issue before the JFTC and is an issue in the present case, we find that the six defendants named in both cases had a similar motive to develop the testimony by direct examination to satisfy Rule 804(b)(1).

The record makes plain that one of the precise issues before the JFTC was whether the six companies made and put into practice agreements on the suggested retail price, retail and wholesale profit margins, and rebate levels for color and black

and white TV. That alleged agreement is a component of plaintiffs' case here, and to that extent the issues are substantially similar in both cases and thus the first requirement for similarity of motive is met. Indeed, since the vast bulk of the interrogation in the Six Company Case was conducted by counsel (surrogates) for the defendant companies, and it was those counsel who elicited all the facts on these points, it would seem unfair not to permit into evidence here what they brought out there, given the similarity of issues.

The second requirement for similarity of motive which we have described in Part II, *supra*, is also met. The purpose for which the testimony was offered by the six defendants in the JFTC proceeding was such that they had an adequate motive for testing there the credibility of the testimony now offered to prove the home market side of the alleged conspiracy.

c. *Other Differences in Circumstances*

While the similarity of motive may be negated by other differences between the circumstances of the two proceedings, the simple existence of such differences does not require a finding of lack of similarity of motive. In the circumstances of this case we find that such differences between the proceedings as do exist do not greatly affect the motive to develop the testimony as to the issue of the alleged home market conspiracy. Because the testimony will be limited to its relevance to that one issue in the case, defendants' arguments that circumstances which now prevail render the former opportunity to develop the testimony meaningless must fail.

First, administrative agency and preliminary hearings under American law, both less than full trials, are nevertheless sufficient forums for admissible former testimony. The crucial factors are that the testimony has been given under oath and that the opposing party had a reasonable opportunity to cross-examine. It is not contended by defendants, nor can we find any evidence, that the testimony before the JFTC was either

not given under oath or was given without opportunity to develop the testimony regarding the issues raised by the JFTC "recommendation."

Second, there is no requirement that the parties to the JFTC proceedings have reason to know that subsequent litigation would ensue. Nor does the fact that the subsequent litigation which did ensue is far more complex than the original action affect the six defendants' motives to develop the testimony regarding the home market price-fixing issue. Because we shall, *see infra*, narrowly limit the purpose for which the testimony may be introduced and the specific defendants against whom it may be used, the additional issues and parties in the present case have no bearing on the similarity of motive to develop the testimony as it will be offered. As McCormick states, "Additional issues or differences in regard to issues upon which the former testimony is not offered are of no consequence." McCormick § 257 at 620-21. And because the evidence will not be allowed against defendants other than the six defendants in the JFTC proceedings, their presence in this action cannot affect the motives of those six defendants.

Defendants' argument that the different sanctions available in each case affects the similarity of motive to develop the testimony likewise must fail. Although there may be valid reasons for defending a small claim less vigorously than a large one, the JFTC proceeding was hardly analogous to a matter in small claims court, *see* n. 77 *supra*, and the respondents in the JFTC proceeding appear to have defended themselves quite thoroughly. Thus, we find no reason to believe that the six defendants would have attempted to elicit any different testimony than that given on the issue of a consipiracy to fix prices in the domestic market.

The defendants submit that the dangers of admitting the JFTC testimony are similar to those involved in admitting the diaries, *i.e.* the testimony is misleading and confusing in the .text of this case, without clarification by a live or deposed .d knowledgeable) witness. The defendants are protected in

this regard by their right and apparent ability to call the delarants as witnesses in the present case and thereby to seek to rebut any inferences they fear might otherwise be drawn.

We conclude then, with the exception hereinafter noted, that as against Sanyo, Toshiba, Sharp, Hitachi, Matsushita, and Melco, who defended the Six Company Case jointly, the testimony of their employees before the JFTC on the issue of retail prices, retailers and wholesalers margins, and the rebate level, all relating to the Japanese domestic market, is admissible as former testimony under Rule 804(b)(1) in this action.

d. *Export References*

The defendants contend that the JFTC proceeding involved only Japanese market matters, and there were no claims of (a) "war chesting" or (b) an "export low price consipiracy," hence, that they did not have an adequate opportunity or motive there to cross examine the witnesses on the issues involved in this litigation. In support of their contention they add that references to export in the JFTC testimony are predominantly characterized by discussions of (a) the witnesses' duties and responsibilities (*i.e.* "export is not my responsibility")[120] and (b) the witnesses' lack of knowledge about export matters.

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[120] Consider, e.g., the following exchange:

> TRIAL EXAMINER: One other point. How do you arrive at the export price? For instance, is the export price calculated by a comparison with the domestic price? Or is there an entirely different method of pricing applied for export purposes?
>
> WITNESS: *Although I am not in a position to answer your question because it is beyond my area of responsibility*, I believe that when a product is sold domestically, expenses on service, shipping, publicity, and so forth are all included in the price. Whereas in the case of export, the price is usually negotiated on the basis of F.O.B., thus excluding all other expenses, covering shipping, advertisement, services, etc. Naturally, there would be a difference in price, as well as in the external design of a T.V. For export purposes, the cabinet is very crude in contrast to the deluxe of domestic models. This is true not only of external design but also true of what goes inside. We can export a set with very simple inside arrangements. Accordingly, from the point of view of manufacturing those television sets for exportation are treated quite differently from those for domestic use. In view of all these factors, we, of course, see some difference in the production cost and consequent price differences in the products.

We agree with defendants' description of the record and with their contentions. While we have ruled that defendants cannot escape whatever cut there may be of the testimony about their activities in the Japanese home market, regardless of its use in an unforeseen lawsuit, we are satisfied that there is no way that any "war chesting" or export references which may appear in the JFTC testimony can be utilized here. While the alleged export conspiracy and its connection to the alleged home market conspiracy is here in issue, it was not even remotely involved in the JFTC case. The defendants would have had no reason whatever to develop by way of direct or cross examination anything about exports or "war chesting" before the JFTC. Thus we shall excise from admission into evidence under Rule 804(b)(1) any reference in the JFTC testimony which could be construed to reference "war chesting" or any export connection.

3. *Predecessor in Interest*

Plaintiffs suggested in oral argument that the six defendants involved in the JFTC proceedings qualify as "predecessors in interest" of all those defendants who were not parties to that prior action, thereby rendering the testimony admissible against all defendants. Defendants on the other hand urge that the six JFTC defendants could not be predecessors in interest of all the other present defendants whose alleged involvement in a conspiracy was unknown at the time. Moreover, defendants argue, many of the alleged co-conspirators have such different interests and strategies that effective representation of one might conflict with the interests of another.

TRIAL EXAMINER: The hearing will now proceed in an open session.

SURROGATE YAMADA: Does the so-called Television Division handle only domestic affairs?

WITNESS: Yes, that is correct.

SURROGATE: Then, you are involved with affairs related to export?

WITNESS: No. *Anything to do with export is done through a separate division*. (emphasis added)

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We agree with defendants that the six JFTC repondents do not qualify as predecessors in interest of the other defendants in this case. Under *Lloyd, supra*, the standard is whether the six respondents had a like motive to develop testimony about the same material as the other eighteen defendants would have had, if they had been represented at the JFTC hearing. *See* Part II.D.3, *supra*. We think they plainly did not, as the six respondents had no motive to inquire about the participation of their present co-defendants in the conspiracy charged by the JFTC. To permit the testimony into evidence against the eighteen co-defendants would be to risk unfair prejudice to them merely because the plaintiffs have joined them with the six JFTC respondents in the present litigation. Apart from the allegation of conspiracy, there is no evidence of a "community of interest" between the six repondents in the JFTC proceedings and the other eighteen defendants in this case, some of whom are not even Japanese corporations.

Moreover, we are cognizant of the factual differences between *Lloyd*, a case involving the government as a representative of the public interest, and the present case, which involves co-defendants with potentially conflicting interests. The facts of this case are much closer to those of *Pinto, supra*, which similarly involved co-defendants with potentially conflicting interests, than to those of *Lloyd*. We agree with Judge Wilson's analysis in *Pinto* of the dangers inherent in admitting testimony developed by one co-defendant against another, and find similar considerations relevant here.

4. *Authentication References*

Plaintiffs offer certain references in the testimony to authenticate some of the diaries. While none of the diaries were formally authenticated during the testimony, and no witnesses were asked directly whether or not a particular diary was genuine, some witnesses were shown particular portions of particular diaries and asked to comment upon them in some way. Some witnesses were shown diaries which they allegedly maintained themselves (e.g., Yajima), while others were

shown diaries maintained by other persons (e.g., Adachi). Plaintiffs offer this testimony as circumstantial evidence authenticating the diaries.

We find the references to the diaries, offered here to authenticate them under Rule 901, admissible against all defendants. There was no issue expressly raised as to the authenticity of the diaries in the JFTC proceeding. However, the six respondents there plainly had ample opportunity, and would have had sufficient motive, to challenge their genuineness when they were shown to witnesses, if in fact they had any reason to suspect that the diaries were not authentic. Moreover, on this narrow issue only, the interest of all other defendants in showing the diaries to be inauthentic was adequately represented by the six respondents. Given the narrowness of the issue, the motive of the six respondent companies to challenge the authenticity of the diaries was identical to the motive which any other defendant would have had to challege their authenticity. Thus, the previous and the present parties shared a like motive to develop testimony about the same subject matter sufficient to make the six respondents "predecessors in interest" of the others under *Lloyd, supra*, with respect to the authentication references only.

D. *Other Hearsay Exceptions, Admissions, and Internal Hearsay*

We need not tarry long on the admissibility of the testimony under the other exceptions We consider the residual exception 803(24) and 804(b)(5) inapplicable to former testimony, for reasons stated in Part II-F, *supra*. The exception for statements against interest, Rule 804(b)(3), is not met because none of the declarants, except Yajima, is unavailable, since their depositions could have been taken; because plainiffs have made no showing from which we could infer that any of the declarants were conscious that tne statements were against their personal interests; and because the testimony is generally consistent

with the defense offered in the Six-Company Case and therefore is not even against the employers' interests.[121]

The plaintiffs also offer the testimony as admissions of the employers of each witnesses. Since we have ruled that the testimony, except for export references, is admissible under F.R.E. 804(b)(1) against the six companies which collectively employed all of the witnesses, we need not consider that contention except with respect to export references. We find the export references in the testimony of only two witnesses admissible as admissions.

While the witnesses may have been authorized to testify before JFTC, thus rendering their statements concerning the domestic market authorized admissions under Rule 801(d)(2)(C), the JFTC proceeding did not concern the export market, and therefore any testimony concerning that market would have been outside their authority under subsection (C). Under Rule 801(d)(2)(D), our inquiry is whether the witnesses whose testimony included so-called export references in fact held positions in their companies which gave them any responsibility for exports. In their list of purported "export references" in the tes timony, the plaintiffs have included portions of the testimony of five persons: Yajima and Kamakura of Toshiba; Tsu Fujio of MEI, Yoshioka of Sanyo; and Nishi of Hitachi.[122]

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[121] Plaintiffs' claim that the testimony is admissible as a business record of the JFTC is not responsive to the pertinent hearsay objection that the witness who testified before the JFTC is a declarant who will not be present at the trial in this litigation. No party has interposed an objection to the JFTC reports of the witnesses' testimony as hearsay. Instead, such matters have been considered, properly, under the rubric of authenticity. Moreover, to the extent that any transcript of testimony is a "memorandum, report, record, or data compilation" of the JFTC, within the meaning of Rule 803(6), it is a memorandum report, etc. only of what the witness *said*, and not of the truth concerning the matters which he testified to. As a result, the testimony would still have to be subjected to hearsay analysis even if viewed as a business record of the JFTC.

[122] These portions of the testimony were designated as export references in a letter of Arnold I. Kalman, Esq., plaintiffs' counsel, dated February 12, 1980. Plaintiffs also designated as export references portions of the testi-

Tsu Fujio was Senior Managing Director of MEI (DSS 61 at TJ004417). Although the record does not indicate what his duties were in the area of export, we are willing to infer from his senior position in the Matsushita parent company that it is more probable than not that his duties had some relation to export. Accordingly, the "export reference" in his testimony will be admissible against MEI only, under 801(d)(2)(D). The same reasoning applies in the case of Mr. Nishi, who was Senior Managing Director of Hitachi, Ltd., DSS 66 at MJ002652, and the "export reference" in his testimony will accordingly be admissible against Hitachi, Ltd. only.

The "export references" in the Yajima and Kamakura testimony, however, are inadmissible. Kamakura was the Director of the TV Business Department of Toshiba Shoji and Toshiba Corporation, and Yajima was a section manager within that department; according to Kamakura's protocol, the department is "in charge of the *domestic* business." DSS 81 at MJ003294 (emphasis added). During his testimony, Kamakura repeated at least five times that he and his department had no responsibility for export matters. DSS 69 at MJ002091-83 and 90-91.

As for Yoshioka of Sanyo, while he does not discuss in his testimony whether or not he had any export responsibility, we do not think that there is anything in the record to support an inference that his duties related to exports. Yoshioka testified that he was the Assistant Director of the Business Department of the TV Division of Sanyo Electric Co., Ltd. Although we have been provided no information about precisely where this put him in the hierarchy of Sanyo executives, he plainly did not enjoy the stature which Nishi and Fujio had within their companies. More importantly, the plaintiffs have conceded in their FPS, with preclusive effect, that Sanyo Electric Co., Ltd., did not engage in exporting. Instead, all exports were channeled through its subsidiary, Sanyo Electric Trading Co., Ltd. *E.g.*, FPS vol. 2 at 773 and 948. Thus Yoshioka's employer did not itself export consumer electronic products to the United States, and Yoshioka's relatively low position in the parent company's hierarchy does not permit an inference, on the record before us, that he had export responsibilities. As a result, the export reference in his testimony is inadmissible.

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mony of Tsuruta of MEI and Hirano of Sanyo. However, we can find no mention of export in the referenced portions of the testimony of either of those witnesses and accordingly we do not discuss their authority here. Plaintiffs designated part of the testimony of another witness, Yasuo Ito, as an export reference, but Ito's testimony has not been proffered in our hearings and is not considered here. We intimate no view here as to whether the "export references" referred to in the text are in any way probative of the "unitary conspiracy" charged by plaintiffs.

Defendants' final contention about the JFTC testimony is that it is replete with hearsay and double hearsay statements. The principles which we enumerated in Part II with respect to internal hearsay are applicable to former testimony as well as to other forms of hearsay. The defendants are correct that there is much internal hearsay contained within the JFTC testimony and that any such hearsay which does not meet the requirements of Rule 805, described above, must be excluded. However, we shall not take the time to review the testimony ourselves at this time for purposes of internal hearsay analysis. Should it become necessary, we shall do so in connection with the summary judgment motions.

IX. *JFTC "Protocols," DSS 75-92*

A. *Introduction*

The "records of statements" ("protocols") were prepared during the course of the JFTC investigation, prior to the initiation of the JFTC hearings. These protocols were prepared by the JFTC investigators based on statements voluntarily submitted by employees or representatives of defendant companies. Plaintiffs offer in evidence the protocols of Messrs. Yajima, Narita, Kamakura, Kamuro, Kawahara (Toshiba); Adachi, Yamamoto (Hitachi); Ito, Okuma (Melco); Maekawa, Saeki (Sharp); and Koiski (Fuji). The protocols were produced by defendants during the course of discovery in these proceedings. Plaintiffs offer the protocols as prior statements

of the declarants under F.R.E. 801(d)(1); as admissions of the defendant companies under 801(d)(2); as public records under 803(8)(B); as former testimony under 804(b)(1); as statements against interest under 804(b)(3); and as admissible under 803(24) and 804(b)(5), the residual hearsay exceptions. Plaintiffs offer these protocols as evidence of what transpired at the Tenth Day and Palace Group meetings, as evidence of the alleged home market conspiracy, and to authenticate the diaries.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The protocols are reliable and trustworthy because their making was governed by JFTC regulations, Articles 6, 8, and 12. Article 12 provides that whenever an investigator has interrogated persons, he shall make a protocol, read it to the deponent, and review it for verification. If the deponent affirms the contents of the protocol, he may be asked to sign and seal the document. The protocol statements are the declarants', not the investigators'.

(2) The protocols are authentic because they were produced in response to interrogatories, were exhibits in the Six Company Case, and were signed by the declarants who acknowledged their truthfulness.

(3) The protocols represent prior testimony because at the JFTC proceeding they were identified as part of the record, and the declarants could have been cross examined concerning their accuracy.

(4) The declarants were authorized by their respective companies to make the statements to the investigators because they gave their statements voluntarily, were identified with defendant companies, and were put forward by defendant companies to testify at the JFTC proceedings.

(5) The protocols are public records of the JFTC within the meaning of Fed.R.Evid. 803(8) since the investigators recorded the statements.

(6) The statements were contrary to the *employers'* pecuniary or proprietary interests. Declarants would have told the truth since there is a perjury provision at Section 92-2 of the JFTC proceedings.

(7) The protocols establish that there was a regular practice by which information concerning the meetings was communicated among defendant employers.

C. *Defendants' Response*

(1) The procedure for producing the protocols was as follows: The JFTC investigators listened to the witnesses, wrote down their versions of what transpired, and would sometimes let the witnesses see the statement, but would more often simply read the statement to the declarant. All changes which were made in the protocols were made by the investigators. The protocols were not statements of the declarants, but statements of the investigators.

(2) The declarants did not testify to the truth of the statements, just that there were "no mistakes." DSS's 88 and 89 do not contain signatures.

(3) Since plaintiffs in their FPS have not listed the declarants as witnesses, the declarants will not be present at trial to authenticate the protocols when they are offered, and no depositions of the declarants have been taken.

(4) There is nothing on the record of this case indicating that the declarants were authorized by the defendant companies to make the statements. The declarants by appearing before the JFTC did not do so in the course of their employment, and the mere fact that the declarants testified at the JFTC hearing does not indicate that the statements before the investigators were authorized or ratified by the employers.

(5) The investigators recorded the witnesses' accounts of what took place in the past. The records were not prepared for purposes independent of litigation.

(6) There is no indication that the declarants had a personal interest at stake or that they feared personal prosecution as a result of giving the statements. Further, there is no indication that they were aware the statements were against their interest.

(7) Portions of the protocol statements are not based on the witnesses' personal knowledge. There are many inconsistencies between the protocols and the testimony.

(8) The protocols do not contain any export references.

D. *Authentication*

We conclude pursuant to F.R.E. 104(b) that the protocols have been authenticated as the genuine protocols given by the various deponents to the JFTC. There is sufficient evidence from which the trier of fact could conclude that the protocols are what their proponents claim, *i.e.*, genuine protocols. We rely in this regard upon: (1) the production of the protocols by the various defendants in response to interrogatories; (2) the fact that the protocols were in fact exhibits in the Six Company Case, and some of them were referred to by witnesses during their testimony; (3) the fact that the protocols were signed by the declarants, acknowledging their truthfulness; (4) the similarity of all of the protocols to each other; and (5) our conclusion from examination of the protocols that their appearance and internal patterns are distinctive characteristics which, taken in conjunction with circumstances, support the inference of genuineness. *See* Part II.A.3, *supra*.

E. *Admissibility Under Exceptions to the Hearsay Rules*

Before reaching the weightier aspects of plaintiffs' contentions and defendants' response, we dispose of the simpler questions of admissibility. First of all, the protocols cannot come in as former testimony under F.R.E. 804(b)(1) because they are not testimony. The former testimony rule encompasses only testimony given at a hearing, and the ex parte interview by the JFTC investigator, even as explained by plain-

tiffs' witness Professor Haley, did not constitute a hearing. Secondly, although the statements and the protocols are direct statements of the declarant, the protocols and any component part thereof cannot constitute statements against interest because of the failure of plaintiffs to make a showing that any of the declarants believed at the time he made the statements that it was against his interest. We have elaborated on this point in connection with our discussion of the diaries and need not repeat it here.

Neither may the protocols come in under the residual exceptions for the same reasons explained in the case of the diaries—failure to meet the foundational burden of establishing that they are more probative on the point than any other evidence which the proponent can procure through reasonable efforts. Nor are the protocols admissible as public records and reports under F.R.E. 803(8)(B) because the statements of witnesses are not "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report." Such a reading of 803(8)(B) would be in direct contravention of its fundamental thesis, *i.e.* the notion that there are circumstantial guarantees of trustworthiness which create a presumption of reliability of government reports. *See* Public Records Opinion at p. 29. The plaintiffs do not offer the protocols simply to establish that the JFTC investigator took the statement accurately, but rather for their truth. No action of the public official is implicated by that proffer and 803(8)(B) is not a basis for admission.[123]

The only basis on which the protocols can come into evidence is under F.R.E. 801(d)(2). Rule 801(d)(2) relates solely to admissions of a party opponent, hence the protocol of Koiski of the Fuji Company cannot be admitted because Fuji is not a defendant in the case. Because the makers of the other "protocols" are employees of either Toshiba, Hitachi, Melco, or Sharp we must turn to the question of their admissibility

[123] The contention that the protocols can come in under 801(d)(1) is baseless because none of the declarants have been proffered as witnesses in the forthcoming trial.

against those companies. Obviously—by the plain terms of the rule—a protocol is admissible only against the company who employed the person giving it.

The plaintiffs having invoked Rule 801(d) in its entirety we must consider admissibility under each of the rule's component parts. Only subparagraphs (B), (C), and (D) are potentially applicable. In the technical sense all of the protocols are adoptive admissions under 801(d)(2)(B) in that they were written by the JFTC investigator and signed by the witness, who thereby manifested his adoption or belief in the truth of the statement written by another. However, the witness's "adoption" would not suffice to admit the statement against the employer. Hence we must turn to the terms of 801(d)(2)(C) & (D).

An immediate problem arises in the case of the protocol given by Mr. Maekawa of Sharp Corporation. Sharp has represented to the Court that Mr. Maekawa was not employed by Sharp Corporation at the time he gave the protocol, hence the protocol could not be admissible under 801(d)(2)(C) or (D). We accept Sharp's uncontroverted representation and conclusion.[124] However, with respect to all of the other protocols, we are unpersuaded by defendants' position that when appearing before the JFTC investigator, the givers of the protocol were neither authorized by their employers nor within the scope of their employment. At all times they were represented by company counsel, were apparently on company time, were identified with defendant companies, and were ultimately put forward by defendant companies to testify at the JFTC proceedings. Under the circumstances we cannot see how we can conclude other than that the declarants were authorized by their employers to give protocols and that, at all events, they were within the scope of their agency and employment at the time they gave their protocols to the JFTC investigators.

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[124] The plaintiffs have pointed out that Mr. Maekawa's employer when he gave the protocol was a company which had the word "Sharp" in its name. However, that fact is plaintly insufficient to establish an agency relationship between Sharp and Mr. Maekawa's employer.

The receipt of the protocols as admissions against Toshiba, Hitachi, Melco, and Sharp respectively does not mean the statements are free from internal hearsay scrutiny. There is much internal hearsay within the protocols which would, at trial, have to be redacted. *See* Part II.G., *supra*. However, we need not for present purposes analyze the protocols to determine which portions must be the subject of redaction for, the protocols contain no export references which would aid plaintiffs in establishing a low price export conspiracy.[125] We shall thus assume, for purposes of the summary judgment motion and the F.R.E. 104(a) preliminary determination on conspiracy, that the protocols are admissible in their entirety.

X. *The "Shimizu Memorandum"—DSS 95*

A. *Introduction*

This memorandum is a hand-written document dated December 29, 1965, bearing the "chop" of "Shimizu." It was seized by the JFTC during the 1966 raid on the offices of Hitachi. Hitachi, Ltd. produced this memorandum to plaintiffs in the course of discovery in these proceedings. At that time the document, which is captioned "the second meeting of the color TV committee," was identified by document identification numbers HJ 50004 through HJ 500010. Although they concede that it is an internal Hitachi memorandum, plaintiffs offer the "Shimizu memorandum" in evidence against all defendants. More specifically, plaintiffs claim this memorandum to be authentic under F.R.E. 901(a), 901(b)(1), 901(B)(4) and 902. They offer it as an admission of Hitachi, Ltd. under F.R.E. 801(d)(2), as a business record under F.R.E. 803(6), as a declaration against interest under F.R.E. 804(b)(3), and under the residual hearsay exceptions F.R.E. 803(24) and 804(b)(5).

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[125] Consequently, we need not consider here whether export matters were within the scope of employment of the givers of the protocols.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The memorandum is on stationery bearing the Hitachi logo.

(2) Mr. Shimizu's "chop" is on the memorandum, thereby identifying him as its author and the memo itself identifies him as a participant in the meeting.

(3) The JFTC exhibit list (DSS 93) identifies the "Shimizu memorandum" as having been seized from a Hitachi, Ltd. file on "the color TV committee."

(4) The contents of the memorandum show it to be a business record.

(5) Information contained within the memorandum concerning group meetings is consistent with information contained within other items of proffered evidence.

(6) The memorandum purports to deal with the "second meeting of the color TV committee" within Hitachi, and this is the type of information which the "ambience" of intracompany reporting demonstrates is regularly communicated within the corporate structure.

(7) The memorandum contains export references and figures.

(8) The memorandum is a business record because it was drafted in connection with a business activity.

(9) The memorandum was kept as a part of Hitachi, Ltd.'s files for a year before the JFTC seized it.

(10) The memorandum is dated as having been written on the date of the meeting to which it refers.

(11) The memorandum is relevant in that it shows that information gathered at Okura and Palace group meetings were utilized in Hitachi corporate planning.

(12) The presence of the letters "UE" in a circle on the memorandum indicates that Mr. Satoshi Ueno of Hitachi, Ltd. who turned the document over to the JFTC investigators, was routed a copy of the memorandum.

(13) The memorandum is a "statement of an Hitachi employee concerning a meeting he was authorized to attend."

The plaintiffs, in a post-hearing memorandum, add a host of other "reasons," but these are in essence conclusory statements which are a function of their interpretation of the document (assuming it is authentic and admissible) purporting to explain its relationship to Hitachi's business practices. These other "reasons" do not add to plaintiffs' argument on foundation.

C. *Defendants' Response*

(1) No evidence other than the mere presence of the chop of a Mr. Shimizu on the memorandum has been presented to indicate who the author of this memorandum is.

(2) Mr. Shimizu of Hitachi, Ltd. is alive and well, but plaintiffs have not deposed him.

(3) The individuals who might be those indicated by name in the memorandum are alive and well, and plaintiffs have not deposed any of them.

(4) Hitachi, Ltd. sells stationery containing the corporate logo to its employees.

(5) This memorandum is not mentioned in either the protocols or the testimony before the JFTC.

(6) The alleged export references within the memorandum are inconsistent and fail to support plaintiffs' allegations.

(7) The text of the memorandum is confused and has possibly been altered.

(8) No testimony of the custodian of this memorandum has been presented.

(9) No evidence of the regularity of creation of this memorandum has been presented.

(10) The memorandum contains multiple hearsay, and no evidence has been presented as to who attended the intercompany group meetings from whence much of the information purportedly contained in the memorandum is derived.

(11) No evidence of communication of the memorandum has been presented.

(12) The memorandum does not contain assertions such as are required for something to constitute an admission.

(13) Without knowing the identity of the author of the memorandum, it is impossible to determine the scope of his agency within Hitachi, Ltd., whether he had authority to speak concerning the matters discussed in the memorandum, or whether his statements are based upon firsthand knowledge.

D. *Discussion*

We find the memorandum authenticated on much the same basis as the diaries the seizure, Hitachi's production, and the "chop." Business record status is, however, another matter. This document is no more a "business record" than the diaries. We do not know who wrote it, nor do we know anything of the method of its preparation, whether it was created by a process involving habits of precision or regularity and systematic checking, or otherwise. There is no showing of who received the document or that it was relied upon. Neither do we know anything of the sources of information of the writer of the memo. The plaintiffs assert that the document speaks for itself, but of course it does not and cannot. The plaintiffs have the burden of establishing that the document is a business record. They cannot shift that burden no matter how hard or often they try. Although Shimizu and others with knowledge have been available, the plaintiffs have not deposed them. Moreover, the memorandum is laden with internal hearsay, including "news from the OKURA group." The document is far from clear; rather, like the diaries, it needs interpretation by someone familiar with it. We shall not prolong the opinion unnecessarily by recapitulating our legal discussion. It is plain from the recitations of the positions of the parties that the applicable legal principles cut in the same way as in the use of the diaries; the document just does not pass 803(6) muster.

Not only does the document not qualify as a business record, but it does not qualify under the other asserted exceptions for statements against interest and the residual exceptions, for the same reasons as in the case of the diary of another Hitachi employee, Yamada. Nor can plaintiffs prevail in their statement that they

> "rely upon the entire ambience created by the protocols that there was a recording system evidenced within companies in which reports were made to people who were not present in meetings in order to inform them of the content of the meetings."

Plaintiffs just have not established the fact they assert, by "ambience" or otherwise. Even if they had established the existence of a recording system generally, it would not establish foundation for any particular entry, in view of the legal precepts we have so extensively set forth in Part II.

Finally, the memorandum is not an admission of Hitachi because we know nothing of the authority of the writer. In the absence of evidence of export authority, in particular, the document is not admissible for any export references.[126] Nor can most of the language in the memorandum, which seems to be written in a kind of shorthand, be fairly characterized as "assertions."

[126] The notion that the memorandum shows an export conspiracy must also be rejected. The export figures reported make little sense. *Inter alia*, they show Hitachi as having no exports in 1965. Thus, plaintiffs' claim that a reference to Hitachi's desire to increase its market share plainly refers to the export market is baseless. If the reference were to the export market, it would be as consistent with a desire to compete as a desire to conspire. In any event, the figures shed no light on an export conspiracy.

XI. *Toshiba Internal Memoranda—DSS 96, 97 and 98*

A. *Introduction*

DSS's 96, 97 and 98 are documents which were seized by the JFTC during the "raids" described above. DSS 96 and DSS 97 were exhibits in the Six Company Case. DSS 98 was not marked as an exhibit therein. These documents were produced by Toshiba Corporation to plaintiffs during discovery in these proceedings and are identified by document identification numbers TJ 4502-4505; TJ 4506-4510; TJ 4511-4513. Plaintiffs offer these as internal Toshiba memoranda to prove the alleged home market conspiracy. Plaintiffs offer these documents as business records under F.R.E. 803(6), as admissions under F.R.E. 801(d)(2), as statements against interest under F.R.E. 804(b)(3), and under the residual exceptions.

B. *Plaintiffs' Foundation for Authentication and Admissibility under one of the Exceptions to the Hearsay Rule*

(1) DSS's 96, 97 and 98 were authenticated by being identified in the protocols and in Toshiba's answers to interrogatories.

(2) The documents bear "receipt" stamps and "confidential" seals.

(3) DSS 96 is a memo from Kamuro to Narita of Toshiba. Kamakura, in his second protocol, DSS 82, identifies DSS 96 as a document coming from Kamuro. Kamuro, in his protocol, DSS 83, admits writing DSS 96. Kamuro based this memo on information received from Narita. Narita, in his protocol, DSS 79, identified DSS 96 as an internal Toshiba memo dated April 11, 1966 referring to an April 18, 1966 Palace Group meeting.

(4) DSS 97 is a Toshiba document sent from Kamakura, Director of the TV Business Division, to Iwata, Senior Managing Director, and Narita. The document refers to a Tenth Day Group meeting. The document was identified in the list of the investigator's evidence, DSS 93. The document contains a notation that it is from the television file. DSS 97 is authenticated based on the "entire ambience created by the protocols" that there was a recording system whereby those who were not present at the Tenth Day Group meetings were informed of the contents of the meetings.

(5) DSS 98 is a Toshiba document from Kamakura, Director of TV Business Division, to Narita, Senior Managing Director. The document was written by Yajima, but Kamakura sent it under his name. Yajima in his protocol, DSS 75, identifies DSS 98 as an internal Toshiba report of the Tenth Day meeting and acknowledges that he wrote it. The reason that the memo was addressed to Narita was because "prices were decided by top level persons."

(6) The contents of DSS's 96, 97 and 98 make them business records. The subject matter of the memos is consistent with testimony concerning the meetings. They also contain the type of information that was exchanged regularly and reported regularly within the companies.

C. *Defendants' Response*

(1) Certain of the memos are not authenticated, and there are differences between plaintiffs' and defendants' translations.

(2) DSS 97 is not identified as to the author, and the list reconstructed by plaintiffs' translators, DSS-93, is not proof of the author's identity.

(3) There is nothing to indicate that DSS's 96, 97 and 98 were communicated outside the company.

(4) There is no indication that the memos were kept in the regular course of business, or that there was a regular routine way of recording these documents to guarantee their trustworthiness. There is no testimony by a custodian or anyone else. The reports are unreliable, not based on first hand knowledge, and contain double hearsay.

D. *Discussion*

We shall not dwell upon DSS 96-98 because they are a virtual carbon copy of the diaries.[127] Like the diaries, they also report on Tenth Day Group Meetings and the only difference is that they were communicated to someone. They suffer from precisely the same vices.

While we are satisfied that DSS's 96-98 have been authenticated, they are not business records for the reasons that the diaries are not business records. We are in the dark as to the method of preparation of the memos. We do not know if their preparation was attended by regularity or systematic checking. We know nothing of the writer's source of information. In addition, the documents are opaque and require interpretation. As with the diaries, we do not know whether the entries reflect what someone said, or what the writer thought or heard someone say, or what he thought they thought. And the memos are suffused with internal hearsay which would itself vitiate their admissibility. Once again, by not taking depositions of someone who could explain them, the plaintiffs have failed to meet their burden of establishing these three memos as business records. Neither are they admissible under the statement against interest and residual exceptions for the same reasons as the diaries, i.e., plaintiffs' failure to meet the unavailability requirements; failure to meet the requirement of consciousness that the statement is against interest [804(b)(3)]; lack of trustworthiness; and failure to establish the memos as more probative than other available evidence [804(b)(5) and 803(24)]. They are not admissions for the same reasons as the diaries, principally plaintiffs' failure to demonstrate that they are assertions.

[127] Indeed, DSS 98 was purportedly written by Yajima.

XII. *"Minutes" of the EIAJ Officers' Meetings—DSS 1027 and DSS 1028*

A. *Introduction*

The EIAJ Officers' Meeting "Minutes" were produced to plaintiffs during the course of this litigation by the Electronic Industries Association of Japan (EIAJ) at its offices in Japan. DSS 1027 refers to a February 16, 1963, meeting and is identified by document identification numbers EIAJ 318-321. DSS 1028 refers to a January 18, 1964, meeting and is identified by document identification number EIAJ 286.

Although plaintiffs had the opportunity to take the deposition of an EIAJ person with knowledge about the identity of the preparer or the method of preparation of the minutes or the sources of information therefor, they elected not to do so, satisfying themselves with mere production. The "minutes" purport to show attendance at the meetings of representatives of some 24 companies other than the defendants.

Plaintiffs offer the EIAJ Officers' Meeting "Minutes" in evidence against all of the defendants. The documents are offered as admissions of the EIAJ and the defendants who were attendees of the meetings under F.R.E. 801(d)(2), (C) and (D), as business records under F.R.E. 803(6), as present sense impressions under F.R.E. 803(1), as statements against interest of defendants who were attendees of the meetings under F.R.E. 804(d)(3), and as admissible under the residual hearsay exceptions, F.R.E. 803(24) and F.R.E. 804(b)(5).

B. *Plaintiffs' Foundation for Authentication and for Admission Under One of the Exceptions to the Hearsay Rule*

(1) The rules of the EIAJ entitle each of the EIAJ members to "peruse" records of the EIAJ and to receive materials published and distributed by the EIAJ. The EIAJ Officers' Meeting Minutes are typewritten and not handwritten, which indicates that they were distributed among the EIAJ members.

The Japanese defendants in this litigation who are EIAJ members have access to these minutes and, therefore, have control over these minutes.

(2) The Japanese defendants form the standing board of directors of EIAJ. Accordingly, they control positions of authority in EIAJ.

(3) Various defendants' answers to interrogatories identify the two officers' meetings referred to in DSS 1027 and DSS 1028 as having been held. The interrogatory answers also state that the Japanese defendants were represented at those meetings.

(4) Judge Higginbotham in the transcript of February 26, 1976, at 280, directed that a good faith effort be made to make EIAJ documents available to plaintiffs and that some responsible person be present when plaintiffs searched for such documents. DSS 1027 and DSS 1028 were produced in accordance with Judge Higginbotham's direction, and Hoken Seki, Esquire, counsel for Melco, was present at that production.

(5) The meetings were held monthly. Minutes were made for every meeting, and were kept at the offices of EIAJ. The format of the minutes follows a consistent pattern. Accordingly, the minutes alone show completeness and accuracy. The meetings for which the minutes were kept conform to the list of the meetings contained in Exhibit B of plaintiffs' FPS. DSS 1027 and DSS 1028 were pulled from a stack of other minutes.

(6) None of the defendants has ever withdrawn as a member of the EIAJ throughout the entire period covered in this litigation.

(7) There is no indication in the minutes that any defendant attendee left a meeting during the course of deliberations. There is also no indication in the minutes that there were any disputes or objections concerning the decisions made at the meetings. The attendees allegedly had an opportunity to object to the minutes. Accordingly, the minutes show that there was consistent unanimity among the attendees. The minutes are thus admissions by all the attendees.

(8) Defendants were receiving information concerning U.S. law, i.e. "the problem of duty appraisement," DSS 1027 [apparently a reference to the 1921 Antidumpting Act] from their attorney in the United States, Mr. Tanaka. Therefore, they had knowledge of the United States laws.

C. *Defendants' Response*

(1) Plaintiffs did not depose anyone from the EIAJ.

(2) Neither DSS 1027 nor DSS 1028 was signed or indicates its author.

(3) The minutes do not show completeness nor accuracy. There is no indication of the methodology of the anonymous authors to guarantee the reliability of the minutes.

(4) There has been no testimony by any keeper or custodian of the minutes or other witness to establish the foundation for admission of the documents.

(5) There is no indication in the minutes as to who said what at the meetings or what the votes were, if any. There has been no showing that the attendees had authority to act or speak on behalf of their employers. Accordingly, the minutes are not admissions by any defendant.

(6) There has been no showing that the author or custodian of the minutes or any of the any of the attendees at the meetings are unavailable, as required under F.R.E. 804(a)(5).

(7) There is nothing to indicate that the by-laws of the EIAJ on which plaintiffs rely were the by-laws that were effective in 1963.

(8) Judge Higginbotham's direction that some defense lawyers be present when plaintiffs search for documents does not catapult the EIAJ documents to admissible status.

(9) There has been no foundation laid for the admission of the minutes against any of the defendants who were not members of EIAJ.

(10) Nothing is shown in the minutes that would be contrary to anyone's pecuniary or penal interest. Application to a governmental agency for assistance regarding receiving tubes (that is one matter mentioned) is not a crime in Japan or the United States, nor does it subject anyone to civil liability. Regarding the check price agreements, the United States Department of Justice has reviewed them on at least two occasions and has not found anything objectionable.

(11) The minutes contain double hearsay.

D. *Authentication*

Although no one has contended that they are specious, and although the task of qualification might not have been difficult had plaintiffs bothered to take a deposition for use at trial, the fact is that plaintiffs have failed to authenticate DSS 1027-1028. As we have explained in Part II *supra*, mere production of a document from an organization's files does not authenticate it. Defendants neither produced nor vouched for the "minutes" in connection with their interrogatory answers. Rather, the "minutes" were produced by an organization which is not a party in this litigation. Unlike some of the diaries, protocols, or testimony, there is no distinguishing feature of the documents that marks them as genuine "minutes" of meetings. We, of course, cannot read the original Japanese, but we certainly cannot say that the English translation bears some indelible imprint that smacks of genuineness. In short, the plaintiffs have done nothing to establish the genuineness of these documents so as to meet the test of *U.S. v. Goichman, supra*.

E. *Business Record Status*

DSS 1027 and 1028 do not qualify as business records for a host of reasons. Plaintiffs seem to think that there is some talismanic effect to be accorded to production by the EIAJ, but, of course, as we have explained above, there is not. This result is unchanged by the fact that there are a number of other "minutes" which were produced, suggesting that whatever

was done with respect to DSS 1027 and 1028 may have been done on a regular basis. We do not have even the foggiest notion of who wrote these "minutes," whether the writer attended the meetings, where he got his information, or when he wrote the entries. We know nothing about his method of keeping records, much less whether it is careful and accurate. Indeed, nothing in these documents suggests completeness. There is no record of who said what to whom, nor do we know whether what is written is what someone said, or what the writer (or someone informing his judgment) thought. The mere fact that the writer (if it was in fact he) did the same thing on other occasions would not help establish DSS 1027-28 as a business record. In short, none of the factors which qualify something as a business record, all of which have been elaborated above, are present here. We agree with defendants' contentions and with their conclusion that these documents do not achieve business record status.

F. *Admissibility Under Other Exceptions to the Hearsay Rules*

DSS 1027 and 1028 cannot come in as admissions. The documents do not attribute any statements to anyone. There is no indication as to who said what at the meeting, and if something was acted upon, there is no indication of who voted and approved it. Indeed, it is conceivable (had there been EIAJ action taken) that the representative of some defendants left the meeting early or voted contra (if the attendance record on 1027 and 1028 is accurate, the defendants were far outnumbered). Nor have the plaintiffs laid any foundation to render EIAJ the agent of any defendant for purposes of an admission. In short, the plaintiffs have not made a showing that these minutes are the assertion of any defendant and they cannot come in under Rule 801(d)(2).

By the same token, statements in the minutes cannot come in as statements against the interest of any declarant. The unavailability requirement for 804(b)(3) is not met. Furthermore, there is no showing that anything was said which the

author of the "minutes" or any person present at the meeting was conscious was against his personal interest. The requirements of the residual exception are not met because the "minutes" are not more probative than other evidence which the plaintiffs could have procured, and are not trustworthy. DSS 1027 and 1028 cannot come in under any of the exceptions to the hearsay rule.

XIII. *The EIAJ Statistics Committee 1966 (or Japan Victor Document)—DSS 1029*

A. *Introduction*

DSS 1029 is an internal memorandum produced from the files of Japan Victor Company ("JVC"), which is not a party in this litigation. It refers to the December 26, 1966 meeting of the Statistics Committee of the EIAJ. It was produced to plaintiffs during the course of this litigation by Victor Company of Japan, Limited at its offices in Japan, and was designated with document identification number V 3747. In plaintiffs' submission, the document shows that the manufacturers who attended a meeting of the EIAJ Statistics Committee, including defendants, agreed to modify their accounting practices to cover up the disparity between home market and export practices.

Plaintiffs offer the Japan Victor document in evidence against all of the defendants in this action. Plaintiffs offer the document as a business record under F.R.E. 803(6), as admissions of JVC and MEI under F.R.E. 801(d)(2), as present sense impressions under F.R.E. 803(1), *see* n. 48, *supra*, as a then existing mental, emotional, or physical condition under F.R.E. 803(3), *see* n. 48, *supra*, and as admissible under the residual hearsay exceptions, F.R.E. 803(24). Plaintiffs offer the Japan Victor document as a non-hearsay verbal act, in which the author reported his understanding of what had been discussed and agreed upon at the December 26, 1966 meeting of the EIAJ Statistics Committee, and in which the author

gave a direction to the manager of the accounting department in order to effectuate internally an agreement reached at said meeting.

Because of the great reliance which plaintiffs place on the Japan Victor document, and the amount of time devoted thereto (plaintiffs alone have filed a 46 page brief relating to its admissibility) we shall deal with it in detail.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rule*

(1) This document was produced pursuant to a subpoena served on and accepted by MEI's counsel on behalf of Japan Victor Company. It was produced at the offices of Japan Victor Company in Tokyo.

(2) The Answers of the Matsushita Defendants to Plaintiffs' Supplemental Interrogatories to Defendants, Set No. 2, dated May 29, 1979, listed JVC as a member of the EIAJ Statistics Committee. The same answers stated in Answer to Interrogatory No. 33 that the December 26, 1966 meeting of the EIAJ Statistics Committee had actually taken place, that MEI's representative had attended the meeting, and that there had been a discussion of the subject referred to in the Japan Victor document. The Answers of the Hitachi Defendants to Plaintiffs' Supplemental Interrogatories, Set No. 2, Relating to Consumer Electronic Products, dated May 25, 1979, Answer to Interrogatory No. 33, stated that the December 26, 1966 meeting had taken place, that Hitachi had been represented at the meeting, and that the subject referred to in the Japan Victor document had been discussed. The Answers of Sony Corporation to Plaintiffs' Supplemental Interrogatories to Defendants, Set No. 2, dated May 22, 1979, Answer to Interrogatory No. 33, stated that Sony's representative had attended the same meeting of the EIAJ Statistics Committee.

(3) Matsushita's Answers to Plaintiffs' Supplemental Interrogatories as mentioned above identified Mr. Oguri as one of the representatives of Japan Victor Company to attend the December 26, 1966 meeting of the EIAJ Statistics Committee. Mr. Oguri's chop appears on DSS 1029. The author of this document is Mr. Oguri, or, at the very least, if he is not the author, he reviewed the document and adopted its correctness.

(4) The document itself identifies the recipient of the document as the manager of the accounting department of the plant. "Common sense" tells the Court that the accounting department is the appropriate place for this document to be sent.

(5) This document contains the directive from the sales promotion section to the accounting department of the plant. "Common sense" tells the Court that an endorsement by the chief of a section where such directive was issued would in fact be needed in order to effectuate such a directive to the accounting department. Mr. Shiokawa was the chief of the sales promotion section. His chop appears on the document, showing this endorsement.

(6) Defendants in their answers to plaintiffs' interrogatories denied the accuracy of what was reflected in DSS 1029. Their denials amount to defendants' admissions of the fact that there was a December 26, 1966 meeting of the EIAJ Statistics Committee. The answers circumstantially evidence the authenticity of the Japan Victor document.

(7) The content of the document shows the obvious knowledge of the document's author regarding what transpired at the meeting and how JVC records the particular information.

(8) "Common sense" dictates that Mr. Oguri, who had represented JVC at the December 26, 1966 meeting, would have to report back to his superiors after the meeting in order to relay the agreement and information which resulted from the meeting. This document is an internal memo of JVC to serve this reporting purpose.

(9) The document bears the legend "confidential outside the company."

(10) The document indicates that it was prepared on January 6, 1967. This was eleven days after the December 26, 1966 meeting. The document was thus prepared in a timely fashion within the time period for effectuating the reduction of the domestic shipment price which would as agreed begin with the shipments for January 1967.

(11) MEI controls JVC by owning at least 51 percent of its shares of stock. JVC is the "alter-ego" of MEI. Accordingly, an admission of JVC which is the subsidiary of MEI is also an admission of MEI.

(12) "Common sense" tells the Court the import, probative value and high relevancy of the document.

C. *Defendants' Response*

(1) Notwithstanding plaintiffs' proffer of this document as evidence against all defendants, the document could even if admissible constitute evidence *aliunde* only against JVC (which is not a party).

(2) There has been no evidence of the author or recipient of the document. There has been no showing of the file where this document originated. There has been no testimony or even an affidavit of a custodian or any other witness about the author, recipient or content of this document, or the practice of preparation of this kind of document. Plaintiffs consciously and willfully refused to take a deposition of Mr. Oguri or Mr. Shiokawa or any other personnel of JVC. Both Mr. Oguri and Mr. Shiokawa are still in the employ of JVC.

(3) Two chops appear on the document, Mr. Oguri's and Mr. Shiokawa's. Part of the alleged chop of Oguri is not even on the document. There has been no evidence that could show the meaning of these chops. There has been no evidence showing that Mr. Oguri, and not Mr. Shiokawa, authored this document. There has been no showing of Oguri's or Shiokawa's

practice of putting their chops on a document. Chops are sometimes used to show receipt of a document as well as who authored it.

(4) There has been no showing of the meaning of the Japanese word "Kokeicho," the title of the alleged recipient. Even on the basis of the plaintiffs' translation of the document, there has been no identification of either the "Manager," the "Accounting Department" or the "plant."

(5) The document does not make sense on its face. The agreement allegedly entered into at the EIAJ Statistics Committee meeting and the measures to implement such agreement do not correlate.

(6) All defendants whose answers to interrogatories identified the December 26, 1966 meeting as actually taking place, denied the accuracy of what was stated in the document as a decision of that meeting. Plaintiffs' argument that defendants' denials that they followed the plan described in the document amount to admissions that there was a plan or agreement of the EIAJ Statistics Committee is pure sophistry.

(7) Plaintiffs failed to take any depositions of Japan Victor Company personnel.

(8) DSS 1029 is the only document produced by JVC relating to a meeting of the EIAJ Statistics Committee. The content of the document does not show anything about whether it was a regularly-prepared document.

(9) Japan Victor Company is a separate company from MEI. It is separately operated, separately managed and has separate product lines, separate distribution and separate brands, and the products are sold in competition with MEI's products both in Japan and in the United States. A 51 percent subsidiary does not make admissions that are ipso facto admissible as to the parent company.

(10) There has been no showing as to who made the statement contained in the Japan Victor document, whether he had

authority to make such statement, or whether he had knowledge of the subject matter. The Japan Victor document constitutes hearsay within hearsay under F.R.E. 805.

D. *Authentication and Business Record Status*

Because of the manner in which plaintiffs have approached this matter, we shall address authentication and business record status together. Much of what is said with respect to the "minutes" of the EIAJ Officers' Meetings applies to the Japan Victor document. We have no notion of who wrote the document, or where or on what basis. In fact, we know nothing about the document except that it was in Japan Victor's files. No defendant, including Matsushita, whose counsel was present when the document was produced, has itself either produced it (or a copy thereof) of vouched for it in answers to interrogatories or otherwise. Matsushita has disclaimed any knowledge about it and sharply disputed its accuracy.

In the absence of some documented explanation, and notwithstanding plaintiffs' hortatory references to "common sense," plaintiffs' claims about Mr. Oguri and Mr. Shiokawa, and the manager of the Accounting Department, are not only unsupported but are sheer speculation. Yet, while the plaintiffs might have taken the deposition of someone from Japan Victor when their counsel was in Tokyo to receive production of the document and thus shed some light on its origin and its genuineness, they elected not to do so.

Notwithstanding some 46 pages of argument, plaintiffs' position as to authentication and business record status of the Japan Victor document is best characterized by the following passage at pp. 40-41 of their brief:

> If a corporation's own documents are not business records, admissions, evidence of corporate knowledge and state of mind or evidence of their nonverbal conduct, then there was absolutely no reason for those documents to exist and be maintained in the first instance . . . *Any document created and maintained by a corporation is*

sufficiently trustworthy as to that corporation to make it admissible at an absolute minimum against that corporation.

The only reason that a corporation would maintain a document in its files is because of that corporation's reliance on that document.

That this formulation is an ipse dixit and without any basis in law is plain from our discussion in Parts II-A-3 and II-B-4, *supra*, where we explained that, particularly in light of the broad sweep of the federal discovery rules, no such inference can be drawn from mere production of a document.

Unwilling to rest solely upon this proposition, plaintiffs advance what Matsushita's counsel appropriately calls several "imaginative but unavailing excuses" for their failure to make any attempt at all to establish a foundation for admission of the document. Plaintiffs' first such contention is that depositions would have been "fruitless" since such questions as who wrote the document and who received it "could never be answered" (p. 16). The possibility that no one at Japan Victor may be able to identify this document does not advance plaintiffs' cause, for it does not follow that because plaintiffs may be unable to authenticate the document they therefore should not be required to do so, or at least to attempt to do so.

Plaintiffs next argue that the Japan Victor document should be admitted because the defendants supposedly do not recall what happened at the meeting in question.[128] This is irrelevant, because the question whether or not defendants recall this specific meeting has no bearing whatsoever on the admissibility of the document. In the next breath, plaintiffs argue that it does not matter whether or not anyone can recall the meeting or identify the document because, in their view, where a witness "repudiates" a contemporaneous document the document must be believed, and not the witness. However, the cases

[128] This is a disputed factual premise. Defendants did not all respond that they could not recall the meeting. *See* answers of Toshiba and Matsushita to interrogatory 33, attached to plaintiffs' memorandum, in which they describe the meeting and deny the accuracy of the Japan Victor document.

cited by plaintiffs[129] have nothing to do with the refusal or inability of a witness to authenticate a document. Rather, they deal with the weight to be given to a document which has been properly authenticated and admitted into evidence, where a witness disputes the accuracy of the *contents* of the document. None of these cases holds that a document is admissible even if no one can authenticate it or lay any sort of foundation for its admissibility.[130] Plaintiffs thus have failed to meet the *Goichman* standard of authentication.

The notion that the Japan Victor document qualifies as a business record does not merit extended discussion. Not only do we know nothing of its author, but we know nothing of the circumstances of its preparation,[131] of its source or origin or when it was prepared. Thus, we do not know if there was any habit of regularity or precision or systematic checking attendant to its preparation, or whether it was maintained in the ordinary course of business, nor do we know whether the

[129] They cite, *e.g.*, *United States v. United States Gypsum Co.*, 333 U.S. 364, 396, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Corn Products Refining Co.*, 234 F. 964, 978 (S.D.N.Y.1916).

[130] *United States v. American Cyanamid Co.*, 427 F.Supp. 859, 865-66 (S.D.N.Y.1977), cited by plaintiffs at p. 21 for the proposition that witnesses from distant locations need not be called to authenticate a contemporaneous document, does not support plaintiffs' argument. In that case the documents at issue were various corporate responses to government questionnaires. There was no dispute as to authenticity, and the authors of the documents, and the circumstances under which they were prepared, were known. The decision, which dealt solely with the hearsay issue, turned on the "reasonable efforts" standard of Rule 803(24).

[131] When we inquired of plaintiffs' lead counsel, Mr. Rome, about what he knew about the circumstances of the preparation of the JVC document, he replied:

> "Just by looking at the document, sir, there is contained in it a statement setting forth that the author of the document was undertaking to report an agreement which was reached at the Statistics Committee." PTO 275 at p. 38. That of course is "bootstrapping" and the defendants have all denied the existence of any "agreement." Indeed, Matsushita has argued convincingly that the "agreement" to change statistical reporting to cover up discrepancies between the home market price and the export price makes no sense (mathematically) in terms of proving plaintiffs' theory of conspiracy. PTO 224 at pp. 230-231.

author had first hand knowledge or received information from someone with such and with a duty to report.

Plaintiffs point to the "obvious knowledge of the author." Such an argument is characteristic of the kind of bootstrapping they have used throughout these proceedings as a substitute for foundation. Plaintiffs also rejoin that: (1) the document was not thrown out, but remained in Japan Victor's files for 10 years; and (2) although Japan Victor produced no other documents purporting to describe the meetings of EIAJ Statistics Committee — which plaintiffs claim met *every month* — Japan Victor did produce memoranda pertaining to other meetings of other groups (specifically, the MD group), which plaintiffs contend, are similiar in "form, content, structure and purpose" to the Japan Victor document.

As to point (1), we note that plaintiffs cite no case which holds that the failure to dispose of a document establishes that it is a business record. There is no such case, and the argument is without merit. As to point (2), the obvious rejoinder is that, using plaintiffs' own criteria, the fact that Japan Victor allegedly attended monthly meetings of the EIAJ Statistics Committee, but had only one memorandum about all these meetings, hardly suggests that Japan Victor had a regular practice of making such memoranda. Nor does the alleged similarity of the document with three other MD Group memoranda prove anything. Although we cannot read Japanese, the documents do not look all that similar to us. The fact that they all have dates on them, and a beginning, middle and end, and (according to the translations) look like memoranda, is hardly startling. Finally, even if there were some similarity, that would be irrelevant, since the MD Group memoranda are as lacking in foundation as the Japan Victor document itself.

In sum, plaintiffs have not met their burden of showing that the Japan Victor document is authentic, *U.S.* v. *Goichman*, *supra*, or that it is a business record.

E. *Is the Japan Victor Document an Admission of Matsushita on the Ground that Japan Victor is its Agent?*

The claim that the Japan Victor document is an admission against Matsushita requires a two step analysis. First, it must be established that the document is an admission of Japan Victor Corp. Then, it must be somehow established that JVC is the agent of Matsushita. We shall not dwell upon the first part of the proposition. We have no basis for applying the strictures of Fed.R.Evic. 801(d)(2)(C) and (D), for we do not know who wrote the document and, therefore, what his authority or the scope of his employment was. Nor is there a scintilla of evidence of adoption by JVC.

Assuming arguendo that the document could be an admission of Japan Victor Corp., there is still no basis for its admissibility against Matsushita. The Rule, on its face, requires the showing of an agency relationship between Japan Victor and MEI. However, the mere fact that a parent company owns some, most, or even all of the stock of a subsidiary company is not sufficient to support a finding of an agency relationship between the parent and its subsidiary. To establish agency, and thus admissibility, plaintiffs would have to go beyond mere stock ownership, and establish that MEI "directly intervenes in the management" of Japan Victor so as to treat it as a "mere department of its own enterprise." *Consolidated Rock* v. *DuBois*, 312 U.S. 510, 524, 61 S.Ct. 675, 685, 85 L.Ed. 982 (1940). We incorporate by reference the discussion in Part II-C-6, *infra*.

Plaintiffs have adduced no evidence that Japan Victor is a "mere instrumentality" of MEI. According to the representation of defendants, management of the two companies is entirely separate; there is no dictation by MEI of Japan Victor's business policies; Japan Victor's stock is publicly traded; it has its own product lines, brand name ("JVC"), distribution and sales organizations, and research and development staff; JVC has its own representatives on industry committees, and the two companies are in fact competitors. Whether or not all of

this is so, the burden is on plaintiffs. What plaintiffs have tried to do throughout these evidentiary hearings is to proffer a document, assert that it looks authentic or that it looks like a business record, and then to seek to shift the burden of going forward and the burden of proof to defendants. This they cannot do.[132]

F. *The Residual Exceptions*

The document is not admissible under the residual exceptions because of plaintiffs' failure even to attempt to procure equally probative evidence by some form of deposition, and because of the lack of trustworthiness of the document. We lack information concerning its source and manner of preparation. The document has internal problems, and as we have noted in Part II-F-3, the burden of showing equivalent guarantees of trustworthiness under the residual exception is on the proponents.

Plaintiffs' argument for admissibility under F.R.E. 803(24) includes the following statement:

> plaintiffs, through interrogatories and requests for production of documents, have failed to discover anything more probative concerning the agreement reached at the meeting of December 26, 1966 (p. 30).

What this means is that there is no evidence to support the statements made in the Japan Victor document. Plaintiffs, of course, do not count as "more probative" the denials of various defendants, including MEI, that there was any such agreement. Since they disdained to take the deposition of even a single Japan Victor employee, or any other person who attended the meeting in question, plaintiffs' argument is untenable. A single deposition of someone like Mr. Oguri, whose chop on the document is a fact upon which plaintiffs so heavily rely, would have been far more probative than this document. Plaintiffs should not be permitted to rely upon their own deliberate refusal to take depositions as a pretext for admission into evidence of an unauthenticated hearsay document like the Japan Victor memorandum.

[132] Plaintiffs also argue: (1) that MEI files consolidated financial statements including Japan Victor; (2) that Matsushita's founder, K. Matsushita, was Chairman of the Board of JVC from 1966 to 1970; and (3) that another MEI director was Japan Victor's auditor (pp. 32-33). This is not even close to the required showing. The filing of joint financial statements means merely that MEI is the majority shareholder of JVC; and the presence of one (or even more than one) common director is also insufficient, under the law, to establish agency. *See e.g., Matter of Bowen Transports, Inc.*, 551 F.2d 171, 178-9 (7th Cir. 1977); *Overstreet v. Southern Ry. Co.*, 371 F.2d 411, 412 (5th Cir. 1967), *cert. denied*, 387 U.S. 912, 87 S.Ct. 1700, 18 L.Ed.2d 634 (1968); *In Re Penn Central Securities Litigation*, 335 F.Supp. 1026, 1035 (E.D.Pa.1971).

The supreme irony here is that the plaintiffs attribute so much importance to the JVC document. It has been famous for years among those involved professionally in this case, and yet plaintiffs have not lifted a finger to establish its foundation.

G. *Non-Assertive Conduct*

As one last ditch effort to seek admission of the JVC document, plaintiffs have fashioned the argument that the JVC memo is admissible as non-hearsay because it is "non-assertive conduct" of Japan Victor, i.e., is said to be evidence of conduct that was not intended to be an assertion. Plaintiffs' argument goes:

> There can be little doubt that the Japan Victor document is evidence of the conduct of Japan Victor in reliance upon the agreement reached at the Statistics Committee of the EIAJ on December 26, 1966. This memorandum constitutes an instruction to change the statistical reporting practices of Japan Victor in accordance with the agreement reached at the Statistics Committee meeting. It is evidence of Japan Victor's conduct in relying upon the agreement to which Japan Victor was a part. This act of Japan Victor's in reliance on this agreement is sufficient evidence of trustworthiness so as to take such conduct outside of the definition of hearsay:
>
> "[W]hen a person acts in a way consistent with a belief but without intending his act to communicate that belief, one of the principal reasons for the hearsay rule — to exclude declarations whose veracity cannot be tested by

cross-examination — does not apply because the declarant's sincerity is not then involved. . . .

[T]he underlying belief is in some cases self-verifying: 'There is frequently a guarantee of the trustworthiness of the inference to be drawn . . . because the actor has based his actions on the correctness of his belief, i.e., his actions speak louder than his word.' " (footnotes omitted). Weinstein's Evidence, § 801(a)[01], p. 801-55.

This argument, conceived after the hearing, is totally at odds with plaintiffs' submission, for the past several years, that the memorandum is offered to prove the truth of the matters contained therein. Nor does the plaintiffs' newly asserted position effectively undercut their long-held view of the document. For the memorandum is not an "act," and there is no evidence in plaintiffs' preclusionary FPS that JVC ever did anything to implement any alleged agreement. To draw the inference that the "act" of requesting a change in statistical reporting procedures resulted from an agreement among manufacturers requires one first to accept—*for its truth* — the portion of the memorandum which purports to recount the alleged agreement. In short, the JVC document is inadmissible hearsay, and to the extent that it is non-hearsay it is irrelevant under Fed.R.Evid. 401. And in any event it would at most be admissible against JVC which is not a defendant, and on this record, not a co-conspirator.

XIV. *TV Export Council Meetings—DDS 1030-1034 (Production by Matsushita)*

A. *Introduction*

DSS's 1030-1034 refer to meetings of the TV Export Council. The documents were produced by Matsushita and are identified by document identification numbers MIH 29097-29098, MIH 29099-29101, MIH 29103-29104, MIH 29105, MIH 29142-29143.

Plaintiffs offer DSS's 1030-1034 in evidence against all defendants. They offer DSS's 1030-1034 as business records of Matsushita under F.R.E. 803(6), as admissions of Matsushita

under F.R.E. 801(d)(2), and as admissible under the residual exception, F.R.E. 803(24). These documents evidence meetings of the TV Export Council from 1969-1973. The documents allegedly evidence defendants' collective participation in responding to the U.S. dumping investigation.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rule*

(1) DSS's 1030-103[illegible] were produced by Matsushita in 1975-76 in response to a set of interrogatory and document requests. These documents were later *referred* to in a number of interrogatory answers.[133] Plaintiffs submit that the answers show that Matsushita regularly attended meetings of the TV Export Council, took the minutes at the meetings themselves, and kept them for their own use and purposes at Matsushita.

(2) DSS 1030 is a document entitled "Minutes of TV Export Council Meeting of November 17, 1969." The chops of Morimatsu and Sonoda are on the document. The initials of Onishi are also on the document.

(3) These documents were not produced to plaintiffs in this case until after discovery had closed. Therefore plainitiffs were unable to identify the persons whose chops and initials appear in DDS 1030.

(4) Matsushita has admitted that it was a member of the TV Export Council, and that representatives of Matsushita regularly attended meetings of the TV Export Council through this relevant time period.

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[133] *See* Amended Answers of MEI to NUE's Interrogatories to Defendants, Set No. 2, dated May 25, 1979, Interrogatory No. 51. These documents were also referred to in Answers of Matsushita Defendants to Plaintiffs' Interrogatories to Defendants Relating to Existence, Location and Destruction of Documents, Interrogatory 19, and in the Amended Answers of Matsushita Electric Industrial Company, Ltd., and Matsushita Electric Trading Co., Ltd. to Plaintiffs' Interrogatories to Defendants, Set No. 1, Interrogatory No. 37, dated May 25, 1979.

(5) The Japanese originals of these documents are stamped "confidential." Matsushita would not stamp a document "confidential" unless it believed it to be genuine or authentic.

(6) Several portions of these documents have been deleted pursuant to assertion of the attorney-client privilege. Defendants would not have claimed attorney-client privilege if these documents were not genuine or authentic.

(7) DDS 1031, dated November 25, 1969, which appears to be minutes of the TV Export Council of November 24, 1969, contains the seals of Isomura and Normatsu. The initials of Yamaguchi also appear on the document. (These persons are not identified in Matsushita's Answers to Inerrogatories.)

(8) DDS 1034 is dated "10/26 (T-h-u) (1400)." From reading the text of the document, it is apparent that it refers to a meeting held on October 26, 1972, because the first paragraph speaks of an "extension of four months until 2/28/73." As indicated by Matsushita's Answers to Interrogatories, these documents were maintained as a regular part of the business of Matsushita. The Answer to Interrogatory No. 19 states "prior to 1971 these notes or minutes were routinely disposed of shortly after the meetings." Thus it can be inferred that "from 1971 until the future such routine destruction no longer became part of Matsushita's course of conduct." Also Matsushita would have entered into a normal business practice of retaining documents by virtue of the fact of this lawsuit.

(9) DDS 1033 contains the seal of Kitaoka. Kitaoka is identified in the Answers to Interrogatories as being an executive of Matsushita who attended meetings of the TV export Council from 1963 through 1973. This document also identifies various other persons as being in attendance at the meeting. The various Answers to Interrogatories identify many of these individuals as being participants at the meetings of the TV Export Council.

(10) The structure of the documents themselves allegedly establishes that the documents were prepared in the regular

course of business in connection with the regular practice of that business. The documents allegedly list "the date, time, place, agenda, and the regular order in which they were prepared, including the summation of the response of each of the individuals who took part in the conversations and discussions at the export council meetings." Plaintiffs rely on the fact that the documents "show a continuing series of these memoranda evidencing the events before the TV Export Council," and the fact "that many of them appeared on a regular basis in the files of Matsushita." The existence of the memoranda on a regular basis, about 25 of them, shows a consistent pattern of business conduct on behalf of Matsushita to record what took place at the particular meetings and to keep them on file at Matsushita. The Matsushita answers to interrogatories state the "from time to time attendants prepared notes and minutes of TV Export Council Meetings." This answer is alleged to show that when something of consequence transpired at the meetings, there was an obligation to report them. Matsushita would not engage in a regular destruction program of something that isn't regularly maintained. A business record does not have to reflect every meeting that occurred.

(11) There is a correlation between the date of preparation of the documents and the date and time which is recorded on them.

(12) MEI acknowledged that the minutes were prepared by its attendants, thus establishing that the documents were prepared by a person with knowledge.

(13) These documents are admissions as stated by Matsushita's answers to interrogatories, "MEI believes that from time to time its attendants prepared notes or minutes." Its attendants are its agents. These documents represent an assertion of what went on during the meetings. The documents were reviewed by others within Matsushita as evidenced by the chops and initials of various persons.

C. *Defendants' Response*

(1) Notwithstanding plaintiffs' proffer of these documents as evidence against all defendants, the documents could, even if admissible, constitute evidence *aliunde* only against MEI.

(2) The identities of the persons whose chops and initials appear on DSS 1030 are not known. DSS's 1033 and 1034 do not contain chops.

(3) These documents contain the headings "TV Export Council *Meeting*" not as plaintiffs assert "TV Export Council *Minutes*." Plaintiffs have not established that these documents are genuine records of TV Export Council meetings.

(4) DSS's 1030 and 1031 appear to be memoranda, but it is not clear to whom or from whom they were sent. DSS 1032 appears to be a memorandum in that it says "to division director." DSS 1033 appears to be an internal Matsushita document. DSS 1034 could be either a memorandum or a minute or some other type document. But there is no identification of who prepared any of the documents. There are seals on these documents of people who were not identified anywhere in this record as having attended the meeting. The documents are not in the form of minutes of meetings. There really is no information concerning these documents.

(5) Plaintiffs misread Matsushita's Answers to Interrogatories. The end of Matsushita's Answer to Interrogatory No. 19 states "To the extent that notes of "minutes" covering the period prior to 1971 have been located, they have been produced for plaintiffs' inspection." This answer does not show any regular practice of keeping the documents. The language in Matsushita's Answer to Interrogatories, "MEI *believes* that from time to time attendance prepared notes or "minutes" of TV Export Council Meetings," does not import regularity of preparation of the notes.

(6) The mere fact that the documents were produced from Matsushita's files and the fact that MEI attended meetings do not establish that the documents are authentic or business records.

(7) The fact that parts of a document have been designated as falling within the attorney-client privilege does not make the document authentic.

(8) As plaintiffs admit, as the result of a strategic or tactical decision plaintiffs did not take depositions of the Japanese defendants. Therefore plaintiffs' argument that they received the documents after the close of discovery is irrelevant.

(9) There is no testimony of a witness or of a custodian of these documents to establish that they are business records. There is no indication who wrote the documents. There is no indication that the scrivener had any personal knowledge of what was contained in the documents because it is unknown whether the scrivener went to the meeting. If the scrivener did not have personal knowledge, it is not known who was the source of the information. There is no indication whether DSS's 1033 and 1034 were prepared in a timely fashion. There is no showing that these documents were regularly prepared during the regular course of business, why the documents were prepared, or whether they were ever sent to anyone. There is further no indication whether these are notes of meetings by a Matsushita employee or minutes of meetings. The documents were retyped from Japanese to English, so that on their face it is not possible to ascertain whether they look like business records. Further, there is nothing to show that the documents accurately reflect what happened at the meetings.

(10) It is pure speculation that these documents represent admissions of Matsushita. Since there is no showing who wrote the documents, there is no way to conclude that it was a person authorized by the company to go to the meeting and take notes.

(11) The confidential stamp was placed on the documents during the course of discovery and does not connote authenticity.

(12) The documents contain hearsay within hearsay.

D. *Discussion*

Because of our desire to move on, we will assume authentication and address the question of admissibility of these documents under Article VIII of the F.R.E.

For the reasons set forth in defendants' contentions #(4), (5), (6) and (9),[134] these documents are not admissible under 803(6). We add only that neither the structure of the documents nor their sheer number nor their retention in MEI's files satisfies the "regular practice" requirement as we have explicated it, *supra*. Insofar as plaintiffs argue that because of late production they were unable to lay foundation by taking depositions a procedure they have not otherwise used in this litigation — we note that plaintiffs failed to avail themselves of that provison of P.T.O. 154 which permitted reopening of discovery for good cause shown. *See* 478 F.Supp. at 948. Good cause shown is expressly stated therein to include late production of documents, thus this excuse is unavailing. Similarly, the memos are not admissible as statements against interest under Rule 804(b)(3) since there has been no showing that their author, whoever that may be, was conscious that they were against his interest, or had any reason whatever to think so. Neither are the documents admissions of MEI. We do not know the identity, hence the authority or scope of employment of the writer of the documents; indeed, we do not know if he was a Matsushita employee.[135] Thus we cannot say that any Matsushita employee made any statement or assertion.[136]

[134] We do not, however, rely upon the "custodian" requirement. See Part II.E.3, *supra*.

[135] Plaintiffs make much of a Matsushita interrogatory answer which states that MEI "believes" that from time to time MEI employees made notes of TV Export Council Meetings. P.T.O. 275, pp. 156-65. That, however, does not link the documents in question to Matsushita. Again, the plaintiffs rely on speculation rather than the careful laying of foundation.

[136] We shall not deal separately with DSS 1035, which is the same type of document as DSS's 1030-34 except that it was produced by MELCO instead of Matsushita. Again, we do not know who authored the document, the source of his knowledge, the method of preparation of the document, et cetera. It suffers from the same vices as DSS's 1030-34 and the diaries and is inadmissible under 803(6), 804(b)(3), 803(24) and 801(d)(2) for the same reasons. This is still another document for which plaintiffs, despite the availability for depositions of persons with knowledge, made no attempt to lay foundation.

DSS 1036 is also a memo purportedly reporting events transpiring at a TV Export Council meeting. Unlike DSS 1030, 1035, DSS 1036 is asserted by plaintiffs to have been authored by an *identifiable* person (Mr. Kumano) who attended the meeting which was the subject matter of the memorandum. We will assume authenticity. However, the status of DSS 1036 under F.R.E. 803(6), 804(b)(3) and 803(24) is precisely the same as DSS's 1030-1034; it does not pass muster and for the same reasons. We note too that the supposed author of DSS 1036, Mr. Kumano, is not only alive and well and has always been available for depositions, but, according to the representation of Melco's counsel, he even speaks fluent English! While it is possible to infer that DSS 1036 was written by a Melco employee, Mr. Kumano or someone else, it is not an admission of Melco for the same reason as in the case of the diaries.

XV. *Conclusion*

The foregoing represents our evidentiary rulings on disputed issues relating to the critical documents generated in Japan. We may consider other Japan-generated documents in our opinion on the motion for summary judgment on plaintiffs' conspiracy claims. The legal principles we have enunciated herein will also be applied in that opinion to additional documents. Because this opinion, which will be filed of record, memorializes a plethora of orders as to the admissibility of various documents, we need not append a formal Order hereto.

ZENITH RADIO CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Dec. 10, 1980.
As Amended Feb. 19, 1981

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Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

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Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, James S. Morris, Kevin R. Keating, Michael S. Press, New York City, Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., Sanyo Elec. Trading Co., Ltd., and Sanyo Manufacturing Corporation, defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION AND ORDER

(Admissibility of Expert Testimony)
Pretrial Order No. 301

EDWARD R. BECKER, District Judge.

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I. *Preliminary Statement*

This is the third and last in a series of opinions addressing evidentiary issues which were the subject of extensive pretrial evidentiary hearings in this complex antitrust litigation, the scope of which has been amply set forth elsewhere.[1] We address herein the admissibility under Article VII of the Federal Rules of Evidence (F.R.E.) of the critical opinions expressed in five compendious reports, totalling some 2700 pages, submitted by plaintiffs' expert witnesses.[2] The admissibility of all of these opinions is vigorously attacked by defendants. The reports, which set forth the opinions to which the experts are prepared to testify at trial and the bases therefor, were required by pretrial order no. 154, the comprehensive case management order that governs this litigation.[3]

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[1] The factual background of the litigation is described in the first of our parallel series of opinions addressing various motions for summary judgment. That first opinion served as an introduction to the summary judgment motions and dealt with the question of subject matter jurisdiction. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1161, 1164-67 (E.D.Pa. 1980). The anatomy of the pretrial evidentiary hearings was described in the first opinion in the evidentiary, as opposed to substantive law, series, which also addresses the summary judgment motions. *See* Opinion (Admissibility of Public Records and Reports), Pretrial Order No. 283, 505 F.Supp. 1125, at 1136-1139 (1980). Further background is provided by the second opinion in our evidentiary trilogy. *See* Opinion (Admissibility of Materials Relating to Activities in Japan), Pretrial Order No. 295 (Sept. 29, 1980). These opinions will hereinafter be referred to as the Public Records Opinion and the Japanese Materials Evidentiary Opinion, respectively.

[2] At our request, in order to facilitate consideration of the expert reports, each expert has provided a summary of the primary opinions to which he would testify. Although plaintiffs maintain that a summary cannot effectively portray the scope of the expert's proposed testimony, we find the summaries helpful, and we shall utilize them as a vehicle for our analysis when appropriate.

[3] Pretrial Order 154 is published as an appendix to our opinion addressed to the necessity for a jury trial. *See Zenith Radio Corp.* v. *Matsushita Elec. Ind. Co.*, 478 F.Supp. 889, 948 (E.D.Pa. 1979). While the jury trial opinion was subsequently vacated and remanded, 631 F.2d 1069 (3rd Cir. 1980), PTO 154 has not yet been the subject of appellate review.

The reports at issue are: (1) "Economic Study of the Japanese Television Industry," by Dr. Horace J. DePodwin, Dr. David Schwartzman, and Marcio Teixeira of Horace J. DePodwin Associates, Inc., an economic consulting firm (the DePodwin Report); (2) "The Pervasive Use of Collusive and Company Group *(Keiretsu)* Activities in Achieving the Rapid Increase of Japanese Exports of Television Receivers to the United States," by Professor Kozo Yamamura, Chairman, Japan Studies Program and Professor of Economics and East Asian Studies at the University of Washington (the Yamamura Report); (3) "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," by Stanley Nehmer of Economic Consulting Services, Inc. (the Nehmer Report); (4) "The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing, and Price Behavior," by Prof. Gary R. Saxonhouse, Professor of Economics, University of Michigan (the Saxonhouse Report); and (5) "Vertical Restraint by Japanese Television Manufacturers: Anticompetitive Effects," by Professor John Owen Haley, Associate Professor of Law at the University of Washington (the Haley Report).[4]

While defendants' objections to the opinions expressed in these reports implicate a number of evidentiary issues, there are two critical overriding questions. The first relates to F.R.E. 703: we are asked to engage in a line drawing exercise to define what materials, although inadmissible in evidence, are encompassed within those "of a type reasonably relied upon by experts in the particular field." While F.R.E. 703

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[4] Five additional expert reports referenced in plaintiffs' final pretrial statement, filed with preclusionary effect pursuant to the provisions of pretrial order no. 154, *see* 478 F.Supp. at 949-50, were not the subject of dispute during the pretrial evidentiary hearings and will not be addressed herein. These reports are an opinion of Milton L. Davies, Certified Public Accountant; an opinion with attachments by Morris J. Cohen & Co., Certified Public Accountant; a report of Walter Lukas, Consulting Engineer; a report of Karl Horn and Vito Brugliera, of Zenith Radio Corporation; and an opinion by the Japanese law firm of Braun, Moriya, Hoashi & Kubota concerning the Japanese commodity tax law.

permits an expert to base his opinion upon materials which would otherwise be inadmissible, it is not clear that the rule cognizes an expert's reliance upon materials which have been independently excluded from evidence by the court by reason of irrelevance or inability to meet one of the hearsay exceptions, because of untrustworthiness or otherwise. Many of the materials which underlie the opinions here under consideration have in fact been ruled inadmissible in our two previous evidentiary opinions. In addition, some of the experts have based portions of their testimony upon advocatory documents such as plaintiffs' Preliminary Pretrial Memorandum, a document of plainly questionable evidentiary reliability. Defendants maintain that such materials may not form the basis for an expert opinion.

Plaintiffs respond that F.R.E. 703 plainly permits an expert's reliance upon inadmissible evidence in forming his opinion, citing caselaw which explains that one facet of an expert witness's expertise is his ability to sift reliable from unreliable information and to analyze the information before him with full understanding of the extent of its validity. In addition, plaintiffs' experts have submitted affidavits certifying that the information upon which they relied in preparing their reports was of a type generally relied upon by experts in their respective fields.

The second critical issue, which relates to F.R.E. 702, is whether, notwithstanding the provision of F.R.E. 704 permitting an expert witness to testify to an opinion embracing an ultimate issue, the "helpfulness" and "specialized knowledge" requirements of F.R.E. 702 preclude an economist from drawing an inference of the existence of a conspiracy based upon his analysis of evidence in the case coupled with his knowledge of treatises describing the practices and patterns of cartels. Defendants contend that plaintiffs' expert reports are not the business of economists, but of "conspiracyologists": that the experts have strayed beyond their respective spheres of expertise and have invaded the province of the jury by drawing factual conclusions based upon the same evidence

which the jury has under consideration. This, suggest defendants, is "lay testimony in experts' clothes," and is impermissible "oath-helping." A related issue is the extent to which the court may consider whether inferences drawn by experts are logical ones, thus excluding expert opinion which the court determines to be illogical (or unreliable), or whether such questions go to the issue not of admissibility but of the weight to be accorded the opinion by the trier of fact. Plaintiffs respond that their experts, with their vast stores of knowledge of economic behavior, are uniquely suited to assist the jury in understanding the evidence before it, and that the conclusion of the existence of a conspiracy is rooted in sound economic theory, plainly within the areas of expertise of these witnesses.

Defendants raise a number of additional objections. They claim that great chunks of the experts' reports are entirely irrelevant; they further suggest that even if the reports were deemed to have some minimal probative force, the fact that permissible materials are inextricably interwoven with highly inflammatory, conclusory rhetoric renders them too prejudicial to be admissible by reason of F.R.E. 403. Finally, they argue that Rule 404(a), regarding the inadmissibility of character evidence, prohibits plaintiffs' experts, principally Professor Yamamura, from implying that the Japanese have a "propensity to conspire." We confine ourselves in this opinion to consideration only of the Article VII objections; the relevancy-based objections will be considered in conjunction with our forthcoming opinion disposing of the overall conspiracy summary judgment motions.

Plaintiffs urge that many of these problems would be mooted in the actual trial context, with the give and take of question and answer, and that our consideration of the admissibility of the expert opinions as memorialized in written reports, which were intended not as exhibits to be independently admissible, but as descriptions of the opinions to which they would testify, is premature. We disagree. It is true that some phrasings of an

expert opinion might be admissible while others might not be,[5] but the two overriding issues outlined above are properly before us and must be addressed at this time if we are to consider the expert opinions in conjunction with (1) our decision on the pending motions for summary judgment on plaintiffs' conspiracy claims; and (2) our preliminary determination pursuant to F.R.E. 104(a) of the existence *vel non* of sufficient independent evidence of conspiracy to permit plaintiffs' evidence to be admissible against alleged coconspirators under F.R.E. 801(d)(2)(E).

The propriety of our consideration of the expert opinions is clear. First, the provisions of Pretrial Order No. 154 requiring the filing of expert reports are plainly within the case management powers of the court conferred by F.R.Civ.P. 16. Indeed, in a complex case such provisions are salutary and to be encouraged. *See Manual for Complex Litigation* § 2.60. They are especially in order in a case such as this in which there have been monumental discovery problems and in which the court has perceived a pressing need for clarification of plaintiffs' case. Second, plaintiffs themselves wish us to consider the expert opinions, believing them to add substance to their case. Alternatively, consideration of the opinions is necessitated by the fact that plaintiffs' case, or at least a significant portion thereof, is at risk by virtue of the evidentiary rulings made in the first two opinions in this series, and plaintiffs have in effect attempted an "end run" around these rulings by offering expert opinions explicitly based upon the excluded material on the grounds that, although inadmissible, it is nonetheless of a type "reasonably relied upon" by experts in the field.

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[5] Obviously, inflammatory rhetoric and highly conclusory statements, which appear throughout these reports, are never appropriate expert testimony. We understand plaintiffs to agree, for they have steadfastly adhered to the position that questions put to the expert witnesses at trial, as well as the answers by the witnesses, would be carefully framed, and rephrased when necessary, to avoid objection. *See, e.g.*, Pretrial Order No. 281 at 117. We do not find it difficult to ignore the rhetoric and focus instead on the gist of the actual opinions offered.

We note that, in a surprising show of unanimity, both plaintiffs and defendants approach the expert reports as single, complete units. Defendants argue that, because many of the opinions contained in the reports are, in their submission, inadmissible, the entire reports must be excluded. Plaintiffs, similarly, appear to imply that the entire reports may be considered if parts are acceptable. We disagree with this approach. Instead, we shall analyze the reports and extract from them (aided by the summaries provided by the experts) those expressions of opinion which are of significance to plaintiffs' case, making individualized rulings as to admissibility.

Before turning to a detailed analysis of each expert report, we will outline the basic legal principles to be applied.

II. *The Applicable Legal Principles*

A. *Rule 703*

1. *The Rule and its Roots*

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Rule represents a departure from the common law tradition of restricting the bases for expert testimony to (1) information obtained by the expert's personal knowledge; (2) the hypothetical question, which assumes facts reasonably supported by the evidence; and (3) in some jurisdictions, testimony previously elicited during the trial, with the expert instructed to assume the truth of the evidence and to base his conclusions thereon. *See generally* 3 *Weinstein's Evidence* ¶ 703[01], at 703-4. All of these common law bases remain permissible under Rule 703, but a significant factor has been added: an expert may now testify to an opinion he has formed

based on information which is not necessarily admissible into evidence, if that information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

That provision grew out of an exception to the hearsay rule which had been employed in a number of jurisdictions.[5] The basis for that hearsay exception was explained by the Fifth Circuit in a case decided while the proposed new federal rules were pending:

> Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources. . . . The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.

United States v. *Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972) (citations and footnote omitted). The court noted that the proposed F.R.E. 703 was in accord.

The hearsay exception which evolved into Rule 703 was originally restricted to a limited group of cases. Perhaps the most frequent application was to permit a physician to testify based in part upon information received from nurses, patients, radiologists, pathologists, and so forth. This is the only ex-

ample, in fact, offered by the Advisory Committee.[6] *See, e.g.*, *Birdsell* v. *United States*, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1965); *Jenkins* v.

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[6] The Advisory Committee Note reads:

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963). See also Blum et al., The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts

United States, 307 F.2d 637 (D.C.Cir.1962); *cf.* F.R.E. 803(4) (the hearsay exception for statements made for purposes of medical diagnosis or treatment).

A second class of cases in which federal courts have permitted expert testimony based upon hearsay information is that involving land valuation based upon comparable sales. *See, e.g., United States* v. *1,516.90 Acres of Land*, 405 F.2d 913 (6th Cir. 1968), *cert. denied*, 395 U.S. 909, 89 S.Ct. 1752, 23 L.Ed.2d 222 (1969); *United States* v. *60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966). Judge Weinstein suggests that this exception was created out of necessity. 3 *Weinstein's Evidence* ¶ 703[02], at 703-12. A third category, related to the second, consists of a few cases in which courts permitted experts to testify as to valuation of businesses based upon diverse background sources, including accounting data. *See, e.g., Standard Oil Co.* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). To the extent that cases permitting expert testimony based upon hearsay information fall into one of these traditional mainstream categories, Rule 703 does not represent the radical departure that some critics had warned against. *See* 3 *Weinstein's Evidence* § 703[02], at 703-9. Nonetheless, given the potential for open-ended receipt into evidence of testimony based upon information of questionable reliability, it is plain that some limitation on the types of information upon which an expert may rely is essential. This possible problem was recognized by the Advisory Committee, which noted:

> If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the

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in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev. Comm'n. Recommendation Proposing an Evidence Code 148-150 (1965).

> point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

See the entire Advisory Committee note, quoted at note 6, *supra*.

Because of the context out of which the Rule arose, (*i.e.*, as an exception to the hearsay rule, *see* pp. 1322-1323, *supra*), the cases which anticipated it can be helpful in determining the practical application of the requirement that an expert testify only to opinions based upon information on which he has placed "reasonable reliance." In *United States* v. *Aluminum Co. of America*, 35 F.Supp. 820, 823 (S.D.N.Y.1940), Judge Caffey, in allowing expert testimony concerning the results of test drills for bauxite deposits despite a lack of personal involvement in the drilling, explained:

> Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court. With respect to the matter, in what impresses me as unambiguous authoritative judicial language, it has been said that "the requisites of an exception of the hearsay rule" are "necessity and circumstantial guaranty of trustworthiness." *G. & C. Merriam Co.* v. *Syndicate Pub. Co.*, 2 Cir. 207 F. 515, 518. [L. Hand, J.] In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable.

The "necessity" element required by Judges Caffey and Hand, drawn originally from 3 *Wigmore on Evidence* §§ 1421-22 and 1690 (1st ed. 1913), *see Alcoa, supra*, at 823, was abandoned by the Ninth Circuit in *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). In that case, which permitted the testimony of an expert regarding the valuation of a business based upon a variety of background

sources, the court focused on the reliability of the underlying information:

> It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. *It is for the trial court to determine,* in the exercise of its discretion, *whether the expert's sources of information are sufficiently reliable* to warrant reception of the opinion. If the court so finds, the opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed.

Id. at 222 (emphasis supplied) (footnote omitted).

Thus it is plain that the "reasonable reliance" requirement of F.R.E. 703 grew from and is cognate with the requirement that information admitted as an exception to the hearsay rule have some circumstantial degree of reliability or trustworthiness. We see the "reasonable reliance" language built into Rule 703 as essentially a shorthand translation of the hearsay rules' trustworthiness element. However, because the evidence before us is far outside the traditional mainstream categories of cases described *supra*, it requires a rigorous application of the general principles enunciated in the cases and by the Advisory Committee.

2. *The Parties' Rule 703 Contentions*

Given the text of Rule 703, the parties to this litigation agree, as they must, that the information which undergirds an expert's opinion need not be admissible into evidence, and that hearsay can be a permissible basis for opinion testimony. Their dispute centers instead upon the extent to which such information may be used and the degree of trustworthiness it must attain. As to trustworthiness, plaintiffs argue, in essence, that

an expert may testify to anything related to his field of expertise, and that it is the expert who is best qualified to assess whether the materials which he has utilized are the subject of reasonable professional reliance and hence are sufficiently trustworthy to support an opinion. Defendants counter that the question of "reasonable reliance" is one for judicial determination, and that the court must recognize limits to the amount and type of inadmissible data upon which an expert may rely, making trustworthiness determinations when necessary or appropriate.

Putting their Rule 703 position in the best possible light, plaintiffs point to numerous economic treatises, studies, and articles cited by their experts—presumably admissible under the 803(18) exception to the hearsay rule—which in their submission suffice to render their experts' opinions based in part thereon admissible. Defendants do not quibble over those sources; they point out, however, that in addition to such legitimate bases of information, plaintiffs' experts have canvassed enormous quantities of material proffered in this litigation, much of which has been ruled inadmissible on various grounds in our two previous evidentiary opinions.[7] Furthermore, the experts had access to, and often cited in their reports, various advocatory documents, such as plaintiffs' preliminary pretrial memorandum (PPTM) and briefs in both this litigation and in other lawsuits.[8] The use of inadmissible or questionable documents was so pervasive, and so many of the experts' assumptions were based wholly on such documents, defendants argue, that their entire opinions are necessarily suspect. Thus in defendants' submission plaintiffs are attempting to import into evidence via the "back door" of their experts'

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[7] This canvass forms the basis of defendants' major objection under Rule 702 to the effect that the experts, by sifting through the evidence in the case and forming conclusions based thereon, are not assisting the jury but rather usurping its function. This argument will be discussed *infra*.

[8] *See, e.g.*, the Nehmer Report at IV-14; Yamamura Report at 128; DePodwin Report at II-20, II-31, *et seq.*

testimony the very evidence already ruled inadmissible, for the underlying basis for the opinion would inevitably be revealed, if not on direct examination, at least upon cross-examination by defendants.[9]

In sum, the primary questions which confront us under Rule 703 are: (1) the identity— the expert or the court—of the ultimate decisionmaker with regard to reasonable reliance on underlying information; and (2) if it is the court, the standards to be used in assessing "reasonable reliance" in a given case.

3. *Identity of Decisionmaker Regarding Reasonable Reliance on Underlying Bases for Opinion Testimony*

As to the first question, our study of the rule and the cases leads us to accept defendants' position. While it is true that some courts have used relatively broad language in describing an expert's ability to choose materials upon which to base his opinion, *see e.g.*, *United States* v. *Sims*, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845, 96 S.Ct. 83, 46 L.Ed.2d 66 (1975),[10] it is nonetheless plain that courts routinely make the decision whether a particular expert has reasonably based his opinions upon trustworthy underpinnings. *See, e.g., Punnett* v. *Carter*, 621 F.2d 578 (3d Cir. 1980); *United States* v. *Genser*, 582 F.2d 292 (3d Cir. 1978), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979); *Pittsburgh Press Club* v. *United States*, 579 F.2d 751 (3d Cir. 1978). *Accord, S. Saltzburg & K. Redden, Federal Rules of Evidence Manual* 426 (2d ed. 1977). The fact that a court may permit certain testimony, finding that a

[9] *Cf.* F.R.E. 705, which provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[10] In *Sims*, the court permitted a psychiatrist to testify regarding defendant's sanity based in part upon conversations with government attorneys and I.R.S. agents, saying: "[y]ears of experience teach the expert to separate the wheat from the chaff and to use only those relied upon by similar experts in arriving at sound opinions on the subject." 514 F.2d at 149.

particular expert's opinion was reasonably based, does not imply that the court does not inquire into the trustworthiness of the underlying data. The Advisory Committee, *see* note 6, *supra*, plainly contemplated that the trial court, as part of its admissibility judgment, would inquire into an expert's reasonable reliance. Furthermore, because the court under F.R.E. 702 must assess a witness's qualification in order to permit his testimony, it follows that when an expert deviates from his area of expertise by basing his opinion upon untrustworthy matters, that assessment must similarly be within the province of the court.[11]

We view the question of reasonable reliance to be a preliminary determination of admissibility under F.R.E. 104(a), analogous to the question of qualification of the witness. We do not consider the affidavits submitted by plaintiffs' experts to the effect that the material upon which they relied in forming their opinions is of a type generally relied upon by experts in their respective fields as in any way determinative of the issue. We deal in this opinion not with a Rule 56 motion, on which the affidavits could potentially be viewed as attempts to create a material factual issue; rather, we have before us a pretrial evidentiary objection under F.R.E. 104(a), pursuant to which we must sift the relevant factors in arriving at a conclusion. We will thus undertake an independent analysis of the trustworthiness of the data underlying the expert opinions in this litigation.

Our conclusion that the judge must be the ultimate arbiter of the reliability of materials upon which an expert witness bases his opinion is congruent with the principles developed previously in this litigation for the admission of public records and reports under F.R.E. 803(8)(C). *See* Public Records Opinion, 505 F.Supp. 1125, at 1143-1150. Moreover, any other result would open the door to the wholesale admission of otherwise

[11] Indeed, the court's assessment of the qualifications of an expert witness, which results in a determination of the witness's ability to give certain types of testimony, can be seen to include a determination under Rule 703.

inadmissible evidence before the jury, not, to be sure, as probative of the truth, but to explain the basis of the expert's opinion. Such a result could not have been contemplated by the rule.[12] We turn then to the standards to be employed in making the Rule 703 judgment.

4. *Standards for Assessing Reasonable Reliance*

The case law under F.R.E. 703 is not particularly enlightening on the subject of standards to be employed in assessing an expert's reliance. Defendants do not dispute that the cases cited by plaintiffs were correctly decided. *United States* v. *Genser*, 582 F.2d 292 (3d Cir. 1978), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979), for example, permitted an I.R.S. agent to testify in a criminal tax evasion conspiracy case based in part upon his own examination of defendants' records and in part upon an audit conducted by other agents. Similarly, the court in *Bauman* v. *Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980), a securities fraud action, admitted the testimony of an accountant who based his opinion on information gleaned from defendants' files and financial statements, his own background and experience as a CPA and management consultant, and "all available information in [the University of Houston] library." These cases are within the mainstream of the Rule as it was conceived by the Advisory Committee, described *supra*. Similarly, *United States* v. *Williams*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S.Ct 1168, 31 L.Ed.2d 231 (1972) *(en banc)*, discussed *supra* at 1322, dealt with the valuation of oil and gas properties based upon various records of, *inter alia*, the companies' prices, operating costs, well records, and past production performance. This extension is a logical outgrowth of the traditional exception to the hearsay rule for expert opinion concerning land valuation.

[12] We note that virtually the same result could be reached under F.R.E. 403 by excluding the expert testimony on the grounds that admission of the underlying basis, when otherwise inadmissible, would amount to unfair prejudice. Rule 403 might be an alternate basis for exclusion of a number of expert opinions addressed (and excluded) herein, but we shall not reach it.

See United States v. *60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966); *Standard Oil Co.* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958).[13]

All of these cases present a picture of an expert testifying to an opinion formed on the basis of a number of sources, some of them hearsay, but all of them either intimately connected with his immediate sphere of expertise, such as in the co-worker audit of the *Genser* case, or upon unquestionably permissible documentary research materials.[14] In none of these cases were the courts faced with the question facing us, whether matters offered into evidence but excluded by the court may properly serve as fodder for an expert's opinion.

The Advisory Committee note to Rule 703 offers little more guidance, pointing out merely that the requirement of reasonable reliance by experts in the field would prevent undue expansion of the rule. *See* note 7 *supra*. By way of example, the Committee points out that an "accidentologist" who attempted to testify as to the point of impact of a collision would not meet the "reasonable reliance" requirement if he based his testimony on the statements of bystanders. Defendants, as we have noted, suggest that the experts in this case are "conspira-

[13] Plaintiffs also cite the equally uncontroversial mainstream cases of *United States* v. *Golden*, 532 F.2d 1244 (9th Cir.), *cert. denied*, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976), in which a special agent was permitted to testify to the market price of heroin based upon information received from other narcotics agents; *Frazier* v. *Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978), which found it appropriate for a civil engineer to testify as to an industry's standard of care based in part upon publications such as safety codes; and *United States* v. *Sims*, *supra* note 10.

[14] Defendants have suggested that the underlying information in these traditional cases is at least potentially admissible. The exception to permit an expert's reliance on such hearsay can then be seen as a matter of convenience to avoid the presentation of authenticating witnesses. *See* transcript, PTO 281, at 112-13. There may be merit in this suggestion.

cyologists" attempting to testify in a similarly impermissible manner."[14]

Turning then to cases cited by defendants, *Pittsburgh Press Club* v. *United States*, 579 F.2d 751 (3d Cir. 1978), could conceivably be read as holding that if the foundation for expert testimony is held to be unreliable, the expert testimony is held to be unreliable, the expert testimony itself is *a fortiori* excludable. *Pittsburgh Press* involved a survey, which was excluded because its methodology was unsound — "neither objective, scientific, nor impartial." 579 F.2d at 759. With regard to the testimony of an economist/statistician and an accountant, the court continued:

> The survey — which we have just held to be inadmissible — was the foundation for certain of the plaintiff's exhibits, and for much of Dr. Kenkel's testimony. Since this second survey should have been excluded, it follows that the evidence based on the survey should have been excluded as well. In particular, Dr. Kenkel's determinations as to amount of outside income and the percentage of gross receipts attributable to outside affairs could not have been admitted into evidence once the foundation for that testimony was excluded. For the same reason, the exhibits prepared by PPC's accountants and the testimony of accountant Di Mario, respecting the Club's net profits attributable to outside business, should not have been admitted into evidence.

Id. at 760.

This language — and it is from a Third Circuit opinion — is extremely supportive of defendants' position, and corroborates our thesis that 703's roots are in the hearsay notions of trustworthiness and reliability. However, we decline to read the *Pittsburgh Press* language so broadly as to automatically exclude from an expert's consideration all matters which have

[14] We deem the Advisory Committee to have used the term "accidentologist" to mean a qualified accident reconstructionist. To the extent, however, that the term may be interpreted to convey opprobrium, it may have the unfortunate result of creating confusion between Rules 702 and 703.

been excluded from evidence at trial. In *Pittsburgh Press*, the expert economist/statistician had participated in the preparation and execution of the survey found to be unreliable. His calculations and exhibits, as well as those of the accounting expert, were extrapolated virtually entirely from that unreliable survey. But while the special factual context and the lack of any specific language make us skeptical that the Third Circuit intended to create any *per se* rule of exclusion in *Pittsburgh Press*, the case does plainly demonstrate that certain materials, excludable at trial because of unreliability, are impermissible bases for an expert's opinion, despite the fact that the expert himself may have deemed them reliable.[15]

Pittsburgh Press is the only case we have found which deals directly with an opinion based upon information actually tendered as evidence at trial. The cases cited by plaintiff and discussed *supra* involved identifiable bases of information, concededly hearsay for the most part, which were never independently proffered in evidence. A number of cases urged upon us by defendants deal with a different class of expert opinion altogether — cases in which the expert opinion was excluded because it was based upon faulty assumptions or unfounded conclusions. *See Punnett* v. *Carter*, 621 F.2d 578

[15] Plaintiffs have suggested that this inquiry amounts to an unfair retroactive application of our evidentiary rulings, but that suggestion is plainly without merit. First, plaintiffs' counsel, who supplied the experts with the bulk of the materials upon which they relied, knew that those materials would be subject to evidentiary review, for the materials had already been challenged in submissions by defendants. Moreover, since plaintiffs eschewed the taking of depositions to establish evidentiary foundation, they knew, or should have known, that the risk of exclusion was high. But the major reason that this argument lacks merit is because we are not applying our evidentiary rulings retroactively at all. As discussed *supra* in our analysis of F.R.E. 703, our exclusion of certain materials from evidence on trustworthiness grounds is one of a number of factors to be taken into consideration in determining whether the foundation for an expert's opinion is reliable. To suggest that use of this factor constitutes retroactive application of our rulings is to imply that an expert may be given *carte blanche* to decide what materials he may reasonably rely upon, a proposition which we rejected *supra*.

(3d Cir. 1980); *Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978); *Bryan* v. *John Bean Division*, 566 F.2d 541 (5th Cir. 1978); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666 (D.C.Cir.1977); *Scheel* v. *Conboy*, 551 F.2d 41 (4th Cir. 1977); *Berguido* v. *Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir.), *cert. denied*, 375 U.S. 895, 84 S.Ct. 170, 11 L.Ed.2d 124 (1963); *Tabatchnick* v. *G. D. Searle & Co.*, 67 F.R.D. 49 (D.N.J.1975). The theory of these cases appears to be that a reasonable expert would not rely on unsupported assumptions in forming his opinion, and that an opinion so based must be excluded.

These cases arose in a variety of procedural contexts — some on review of trial proceedings, some on review of summary judgment proceedings, and one (*Punnett* v. *Carter*) on review of denial of a preliminary injunction. It is frequently unclear whether the court is making a judgment as to admissibility, or whether it is deciding whether the expert testimony raises a material factual issue under F.R.Civ.P. 56 (although that would have to result from admissible evidence, *see* Rule 56), or whether it is making a judgment on an abuse of discretion standard. Even when the issue is plainly admissibility, it is not always clear what rule is used as the basis for the court's decision. For example, as alternative theories, some courts deem an opinion based on unsupported assumptions to be unhelpful to the jury under F.R.E. 702, discussed *infra*, or to be so misleading as to be excludable under F.R.E. 403, instead of being unreliably based under F.R.E. 703. In any event, all of the above-cited cases refuse to countenance expert testimony based upon what the courts determine to be unreasonable assumptions. Despite the variety of procedural contexts and variety of F.R.E. pigeon-holes, they indicate that the assumptions which form the basis for the expert's opinion, as well as the conclusions drawn therefrom, are subject to rigorous examination. We turn to a brief discussion of these cases.

In *Merit Motors, supra*, one of the more thoroughly reasoned of the cases cited, plaintiffs had attempted to prove antitrust injury by way of an expert report detailing the "inherent" economic effects of defendant's system. Defendants attacked the expert's theories on their motion for summary judgment, arguing that the theories were "abstract speculation" and that the expert was, by his own admission, unfamiliar with the record of the case. The district court agreed, dismissing the expert's theory "since his opinion [was] unsubstantiated by any evidence in the record." 569 F.2d at 672, *quoting* 417 F.Supp. at 272. On appeal, the D.C. Circuit, in an opinion by J. Skelly Wright, J., affirmed, observing:

> Even Rule 703 requires that the grounds relied on by an expert must be "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." While appellants claim that Staelin has merely applied "standard economic theory" to "a factual basis which is uncontroverted," it is obvious that [the expert] makes unsupported assumptions about the elasticities of demand in various markets and that he virtually ignores the impact of the dominant forces in the automobile market: General Motors and Ford.

569 F.2d at 673 (footnotes omitted).[16]

Punnett v. *Carter*, *supra*, the most recent Third Circuit discussion of the topic, arose on a motion for a preliminary injunction, and so it is not strictly applicable to the present

[16] *Merit Motors* is also important to this case for its comments regarding the relationship between expert opinion testimony and summary judgment. Bracketing the portion quoted in text, the court stated:

> On appeal appellants attempted to salvage their expert's opinion by relying on cases applying Rule 703 of the Federal Rules of Evidence, adopted in 1975. This rule was intended to broaden the acceptable bases of expert opinion, but it was not intended, as appellants seem to argue, to make summary judgment impossible whenever a party has produced an expert to support its position. . . . To hold that Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than Staelin's theoretical speculation would seriously undermine the policies of Rule 56.

569 F.2d at 672-73 (footnotes omitted). We shall have occasion to discuss this point again when we address the question whether the expert reports create a genuine issue of material fact in our forthcoming opinion addressing defendants' motions for summary judgment as to plaintiffs' conspiracy claims.

litigation. In that case, which requested relief for alleged mutagenic dangers stemming from nuclear testing in Nevada in the 1950's and 1960's, radiation dosage levels were pivotal to a showing of likelihood of success on the merits. After analyzing the expert's testimony, the district court had concluded that the assumptions upon which the expert relied were not supported by the evidence or by the methodology. The Third Circuit upheld the district court's refusal to grant the injunction because of the unconvincing nature of plaintiffs' scientific evidence. There was no reference to the rules of evidence, for admissibility was not at issue. Nonetheless, the case demonstrates a willingness in this circuit to question expert assumptions and to disregard them when appropriate.

In *Berguido* v. *Eastern Air Lines, Inc.*, *supra*, a pre-F.R.E. wrongful death action in this circuit, experts testified to their opinions as to the behavioral character of the plane's pilot (in particular, degree of risk and intent to violate regulations), based upon assumptions presented in a hypothetical question. The assumptions had been drawn from the report of the CAB investigating team, which was in turn based upon calculations by an engineer not before the court. Because it was revealed that the engineer must have made "certain assumptions and choices relative to the physical facts found at the crash scene before he could reach the final computation state," 317 F.2d at 632, and because he was not available for cross-examination to test the basis of his computations, it was held to have been prejudicial error to have permitted the second expert to base his conclusions upon those calculations.

Bryan v. *John Bean Div.*, *supra*, similarly addressed a situation in which the testifying expert relied upon reports of non-testifying experts. The expert in that products liability case had utilized the data reported by another, but had reached a contrary conclusion. The court held that cross-examining counsel's extensive impeachment use of the written conclusions of the previous expert, who did not testify, was impermissible despite F.R.E. 705, although the expert's use of the underlying data was apparently proper. While basing its deci-

sion primarily on lack of trustworthiness, the court noted in passing that the jury's attention could have been drawn to the reports by bringing those experts before the court.

Tabatchnick v. *G D Searle & Co.*, *supra*, refused to permit an expert to testify when he expressed bare conclusions based in part upon "facts" contradicted by the record. *Drayton* v. *Jiffee Chemical Corp.*, *supra*, and *Scheel* v. *Conboy*, *supra*, both rejected economists' damage calculations as based on unreasonable or speculative assumptions.

We believe these cases to have been soundly decided, but all were decided on their individual factual patterns and none provide us with a conceptual framework for assessing reasonable reliance. Drawing on these cases, on Rule 703 itself, on the Advisory Committee Note, and on the history of the Rule, including the pre-Rules cases, we have concluded that the following factors should guide our determination as to the reasonableness of reliance in cases outside the "mainstream" of Rule 703 as we have explained it:

1. The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;

2. The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;

3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;

4. The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;

5. The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicat-

ing that he has taken that factor into consideration in forming his opinion;[17]

6. The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

We add that if, for example, an inadmissible document were one of a myriad of sources consulted by an expert, and if it were clear that the expert was cognizant of and took into consideration the questionability of that lone source, the opinion would likely be admissible. If, on the other hand, the expert's opinion is so dominated or pervaded by his reliance on materials which have been excluded for reasons which bear on their reliability, or is rife with similarly unreliable unsupported conclusions, having no support in the record, that opinion must also be excluded. In short, it is a balancing process. We will thus examine the sources of plaintiffs' expert opinions with these factors in mind, and will exclude those portions which prove to be pervaded with reliance upon unreliable sources.

We turn to the issues presented under F.R.E. 702 and 704.

B. *Rules 702 and 704*

The parties are also in sharp dispute over the proper interpretation of Rules 702 and 704. F.R.E. 702, which for the most part codifies existing common law, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The foundation of this basic rule concerning expert testimony is that testimony must be helpful to the jury. As defined by the Advisory Committee, the helpfulness inquiry is " 'whether the untrained layman would be qualified to determine intelligently

[17] We would limit applicability of this criterion to close cases of admissibility. An expert who was a true "hired gun" could always surmount it.

and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' " *quoting* Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 418 (1952). The rule thus expands slightly the practice of most jurisdictions of permitting expert testimony only when the subject matter was otherwise beyond lay comprehension. *See generally* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 413 (2d ed. 1977). Another expansion from the common law is the final "or otherwise" clause, which permits an expert not only to render an opinion, but, as described by the Advisory Committee, to "give a dissertation or exposition of scientific or other principles relevant to the case" as well. This would leave the trier of fact to apply the principles to the facts as they develop and obviate the need for a hypothetical question. Of course, the dissertation or exposition must still meet the "helpfulness" standard that is central to the rule.

In addition to helpfulness, F.R.E. 702 requires that an expert witness be qualified by scientific, technical, or other specialized knowledge. Without such specialized knowledge, his testimony would not be helpful to the jury. For example, if the expert's qualifications are suspect, he would be no better than the average juror at interpreting matters upon which his expertise is expected to bear. Similarly, if no specialized knowledge is needed, the jury will not be assisted by expert testimony which merely tracks the same analytical process which they as jurors are capable of carrying out.

Under the common law, no witness could testify to matters which would usurp the province of the jury by expressing an opinion on the ultimate issue in the case. Following a growing trend to permit such testimony when it is helpful, the "ultimate issue" rule was abolished for the federal courts in Rule 704:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The framers of the rule had in mind testimony on such questions as sanity, testamentary capacity, intoxication, speed,

and value. *See* Advisory Committee Note to Rule 704. Because of the plain language of the Rule, it cannot be disputed that testimony concerning the ultimate issue in the case is permitted only if otherwise admissible. Ultimate issue testimony which does not assist the trier of fact is not rendered magically admissible by Rule 704; rather, if such testimony is helpful, it is no longer automatically excluded under the common law. Indeed, even helpful ultimate issue testimony is not automatically admissible. As explained by the Advisory Committee:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

Defendants in this litigation do not dispute that, in an appropriate case, an expert witness may opine on an ultimate issue. They argue, however, that in this instance, plaintiffs' experts have gone beyond the types of testimony contemplated by the Rule and have entered the province of "oath-helping" by merely interpreting the evidence which will be before the factfinder, explaining, in effect, what result should be reached. Plaintiffs counter that testimony on an ultimate issue is plainly admissible and that their experts' specialized knowledge will indeed help the factfinder to interpret the evidence before it. Thus, as we see these arguments, there is no real issue under Rule 704 in this case; instead, we are asked to determine, pursuant to Rule 702, whether (a) these experts' reports do provide "scientific, technical, or other specialized knowledge";[18] and (b) whether that specialized knowledge will

[18] At this time there is no challenge to the professional qualifications of the experts. The question is whether they have utilized that expertise in the preparation of their reports, or whether they have gone beyond the realm of that expertise and drawn impermissible legal conclusions or presented what are in actuality lay interpretations of the documents in the case.

assist the jury, or whether it invades the jury's function and becomes "oath-helping."

Standards for determining whether particular expert testimony will assist the jury have not, to our knowledge (and indeed could not have) been developed with any precision beyond what was described by the Advisory Committee, quoted *supra*. Rather, courts have necessarily approached the question on an *ad hoc* expert-by-expert basis. Nonetheless, the cases which have considered the question are instructive insofar as they define the contours of the types of information which are considered helpful to the trier of fact.

It has been held that it is helpful to a jury for an expert to interpret jargon or methodology peculiar to particular enterprises, and for the expert to form an opinion as to a given defendant's role in the operation based upon evidence in the record. *See United States* v. *Scavo*, 593 F.2d 837 (8th Cir. 1979) (gambling); *United States* v. *Milton*, 555 F.2d 1198 (5th Cir. 1977) (gambling); *United States* v. *Jackson*, 425 F.2d 574 (D.C.Cir. 1970) (pickpockets). Similarly, expert testimony was permitted in *United States* v. *Jenson*, 608 F.2d 1349 (10th Cir. 1979) (securities fraud action), to interpret certain rules of the National Association of Security Dealers, including the effect of these rules on certain computations. Because the rules were the private rules of a self-regulating association, their interpretation was held not to be a legal conclusion within the province of the court, and was helpful to the jury.

On the other hand, expert testimony was excluded in *Marx & Co.* v. *Diners Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). In that case, also involving securities fraud, an expert on securities law testified as to the legal construction of the contract at the heart of the action, and expressed his opinion as to the reasonableness of defendants' behavior.[19] In ruling that the testimony was

[19] Defendant Diners Club had acquired the assets of plaintiff's company in return for unregistered Diners stock and other consideration pursuant to an agreement which provided that, upon notification from plaintiffs of a desire

erroneously received, the Second Circuit took the time to discuss generally the types of expert opinion appropriate in a complex case. In *Marx* the expert would have been competent to explain to the jury, under the "or otherwise" clause of F.R.E. 702, the customary practices followed in registering an issue of stock with the SEC. He could not testify, however, as to the legal consequences he believed could be derived from an acquisition contract, for it is for the court, not a witness, to instruct the jury as to applicable legal principles. Furthermore, the expert was qualified only as an expert in securities regulation; contract law was held to be outside his area of expertise. Perhaps most damaging, the expert had testified that defendant had no legal excuse for nonperformance of the contract, basing his conclusion on his examinaton of documents and correspondence which were before the court. The Second Circuit held this testimony to be superfluous, and continued:

> As Professor McCormick notes, such testimony "amounts to no more than an expression of the [witness'] general belief as to how the case should be decided." *McCormick on Evidence*, § 12 at 26-27. The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case. *McCormick on Evidence*, § 12, at 27. It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum.

550 F.2d at 510. Finally, the court warned against allowing jury trials in intricate cases to become "battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." *Id.* at 511.

In *United States* v. *Fosher*, 590 F.2d 381 (1st Cir. 1979), a criminal action, defendant sought to introduce expert testimony concerning the unreliability of eye-witness testimony.

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therefor, Diners would file a registration statement for the stock and would use its "best efforts" to cause the registration statement to become effective. Plaintiffs contended, *inter alia*, that defendants had failed to use their best efforts to make the registration effective as part of a manipulative scheme to prevent plaintiffs from offering their shares for sale, to plaintiffs' detriment.

The Court upheld the trial court's refusal to permit the testimony, pointing out that issues of credibility are traditionally jury matters, and that a jury, aided by the traditional cautionary instruction, is perfectly capable of assessing an eyewitness's ability to perceive and remember without scientific testimony on matters such as the rate of memory decay. In short, the subject matter was not sufficiently beyond the ken of lay jurors to justify introduction of material of questionable scientific validity with potentially prejudicial effect.

Similarly, the court in *United States* v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976), refused to permit a psychiatrist to testify that the major prosecution witness was psychopathic and incapable of telling the truth. The testimony would not have been helpful to the jury, which already knew about the witness's bizarre behavior and status as an accomplice. These facts were held to be enough to permit the jury to assess credibility, for even the psychiatrist admitted that twelve average people would recognize that the witness's testimony must be carefully reviewed. *Cf. United States* v. *Collins*, 395 F.Supp. 629 (M.D.Pa.), *aff'd mem.*, 523 F.2d 1051 (3d Cir. 1975), *cert. denied*, 423 U.S. 1060, 96 S.Ct. 797, 46 L.Ed.2d 651 (1976) (expert testimony on reliability of eyewitnesses excluded on relevancy grounds).

In *Webb* v. *Fuller Brush Co.*, 378 F.2d 500 (3d Cir. 1967), a pre-F.R.E. case, a physician was not allowed to testify to his opinion whether a jar of cream should have contained a warning, for once the facts regarding the cream's dangerous character were in evidence, the jury needed no expert guidance in reaching a further conclusion.

And, in a copyright infringement suit brought by the sons of Ethel and Julius Rosenberg over quotation of their parents' letters, expert testimony by literary authorities concerning the qualitative impact of the letters on the quoting publication, a question relevant to the fair use issue, was held to be unhelpful to the jury in its deliberations. The jury was held to be "fully

competent to understand the subject matter of the work and to evaluate the qualitative importance of certain materials to the presentation of that subject," especially in this "famous and controversial" context. *Meeropol* v. *Nizer*, 417 F.Supp. 1201, 1211 (S.D.N.Y. 1976), *aff'd in part and rev'd in part on other grounds*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978).

The cases discussed under F.R.E 703, *supra* at 1328-1330, which refused to accept expert opinion based upon faulty assumptions and unfounded conclusions, are also instructive in this context.

Although the case law is limited, and adds little beyond examples to the Advisory Committee Note and the Rule itself, it makes several things plain. First, expert opinion must be approached on an expert by expert, or even opinion-by-opinion, basis, and the court must, as with the data underlying an expert opinion discussed *supra*, carefully examine each opinion offered by the expert to assess its helpfulness to the jury. Second, while it is not immediately obvious whether the inquiry should proceed under F.R.E. 702, 703, or 403,[20] it is clear that the court may—indeed must—carefully scrutinize the underlying assumptions, inferences drawn, and conclusions reached by the experts before reaching a decision on admissibility of the expert's opinion. Opinions which contain inferences which cannot logically be drawn are no more helpful to the jury than are opinions based upon unreliable information. Third, and of critical importance here, opinions do not assist the jury when they are cumulative of evidence already before the jury, or when the expert has sifted through that evidence reaching a conclusion which in essence attempts to tell the jury how it should decide the case. Rather, the expert

[20] It has also been suggested that the inquiry could proceed under F.R.E. 401, for opinions with faulty assumptions, inferences, or conclusions arguably have no "tendency to make the existence of any fact" in issue more probable than not, and are hence irrelevant. If that were true, however, F.R.E. 703's helpfulness requirement would be rendered largely superfluous.

must utilize specialized knowledge, not ordinarily possessed by the layman, to reach an opinion which truly aids the jury in understanding the evidence or in determining a fact in issue.[21] We think one of the best expressions of this principle is contained in Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation*, 20 Case Western L.Rev. 527, 546 (1969): "The expert should strive to instruct the court *in the ways of his work*, whether it be psychology, literature or whatever, and to explain the nature of the judgments made in that work" (emphasis added). We shall refer to this formulation from time to time.

If, as defendants contend, the expert opinions in this litigation stem merely from a rehash of the evidence already before the trier of fact without adding a component of expertise, *i.e.*, without instructing the trier of fact "in the ways of his [the expert's] work," those portions will be found inadmissible because they are the unhelpful "oath-helping" of a "conspiracyologist." If, on the other hand, the experts' economic sophistication enables them to explain the evidence to the jury in a permissible manner otherwise beyond the jury's sphere of knowledge, the opinion would be admissible. We note that expert testimony may not be used merely to interpret a factually complex record. The test for admissibility of an expert's opinion turns not on complexity but on the subject matter of the opinion, *i.e.*, on whether the expert's specialized knowledge enhances the jury's understanding.

The task of the court is to sift through the reports, parsing out those portions which will aid the jury. We reiterate that we are not considering the admissibility of these reports *qua* reports as documents to be admitted into or excluded from evidence. Rather, we are assessing the admissibility of the key opinions expressed in the reports, purged of their rhetoric and stylistic devices, as though they were being carefully framed at

[21] As discussed *supra*, relevance issues, including those of unfair prejudice and waste of time under F.R.E. 403, will be deferred for consideration until the opinion addressing the issue of conspiracy.

trial.[22] We turn first to the report prepared by DePodwin Associates, Inc.

III. *The DePodwin Report*

A. *Introduction*

The DePodwin Report,[23] "Economic Study of the Japanese Television Industry," is by far the most careful, scholarly, and disinterested of the reports submitted by the plaintiffs' expert witnesses.[24] The meat of the three-volume report appears in

[22] We do not intend to consider all the opinions expressed in the reports. Rather, we will restrict our inquiry to those opinions germane to the summary judgment motion and the 104(a) determination on the conspiracy claims.

[23] Dr. Horace J. DePodwin is president of Horace J. DePodwin Associates, Inc., a team of industrial economists. He holds a Ph.D. in economics from Columbia University, and is Dean of the Graduate School of Business Administration at Rutgers University. He was also consultant to the U.S. in the General Agreement on Tariffs and Trade (G.A.T.T.) negotiations and chairman of the Business-Economics Section of the American Statistical Association. He has published widely and has served frequently as an expert witness in various antitrust and trade matters.

Also contributing to the DePodwin report were Dr. David Schwartzman and Marcio Teixeira. Dr. Schwartzman holds a Ph.D. in economics from the University of California at Berkeley. He has held numerous teaching and consulting positions in the United States and Canada, and has published widely. The record contains no biographical data on Mr. Teixeira.

[24] By its very phraseology, this comment is comparative in nature. However, we refer herein only to the report, and not to the lengthy affidavit filed by Dr. DePodwin on September 23, 1980. This affidavit is in the nature of a point by point refutation of contentions raised by defendants during argument of the summary judgment motions, with, on some points, a total change of theory. We will comment upon the substance of the affidavit in our opinion on the sufficiency of plaintiffs' conspiracy claims. What is noteworthy here is its tenor and its style, for the affidavit does not present an economist's opinion; rather, it is a lawyer's brief. As such it not only demeans itself, but also calls into question the objectivity of the remainder of Dr. DePodwin's work, raising questions as to whether he is in fact acting as an economist or as an advocate. We note with reference to Dr. DePodwin's credibility that all inferences must be taken in favor of plaintiffs in our consideration of the summary judgment motions. That is not the case, however, with the determination to be made as to the sufficiency of plaintiffs' proof of conspiracy under F.R.E. 104(a).

Volume I. Volume II is a statistical appendix, and Volume III is a compilation of damage calculations for plaintiff National Union Electric Corporation.[25] As described in the introduction, the report "presents the preliminary results of a continuing economic study of the Japanese television industry undertaken at the request of plainfiffs' counsel" in this litigation. The study focuses on:

> the unusual sales increases achieved by the defendants in the United States market. It seeks to determine how the growth and development of Japanese television sales in the United States were related to the agreements and arrangements among Japanese producers, United States importers and mass merchandisers, distributors and others. In particular, the study seeks to determine whether certain restrictive trade practices engaged in by the defendants and others resulted from concerted activity, and whether they constituted an unreasonable restraint on the trade and commerce of the United States. Additionally, the study seeks to determine the economic significance and impact of pricing practices on the marketing of television manufacturers and their affiliates, [and] whether the use of restrictive trade practices by them represented the exercise of concerted market power with the intention of affecting the United States industry.

DePodwin Report at I-1. Finally, the study assesses the injury to and damages incurred by plaintiff NUE.

The first thing that strikes one about the stated objectives of the DePodwin study is the concern with determining the existence of a conspiracy and of conspiratorial intent. Those are not the kinds of concerns one thinks of at first blush as being

[25] We will not reach issues relating to damages at this stage of the litigation.

In addition to the three-volume report and the recent affidavit discussed in note 24, *supra*, Dr. DePodwin submitted an affidavit in August 1980 clarifying his position with regard to certain price differentials originally set out in Appendix B to Chapter VI of his report. The August 1980 affidavit was filed in response to an affidavit submitted in May by Kenji Yamagishi, a Matsushita employee, which had taken issue with DePodwin's assumptions. These matters are discussed at 1356-1363, *infra*.

within an economist's purview. We merely note this point now, reserving fuller consideration for later, and turn to an equally disconcerting matter, the fact that the report begins with a number of assumptions which are themselves matters of dispute among the parties. For example, the report assumes the existence of agreements among the Japanese manufacturers, as well as the existence of certain restrictive trade practices.[26] These introductory comments serve as a warning to the reader to be wary of unsupported assumptions while proceeding through the report.

As described by DePodwin in his summary submitted in connection with the evidentiary hearings, *see* note 2, *supra*, the principal conclusion which he reached is that

> by means of a broad range of anticompetitive practices, Japanese manufacturers of television receivers, particularly the defendants, succeeded in gaining a large share of the United State market. To achieve this objective, they carved out a substantial portion of that market and proceeded to saturate it with sales promoted through a variety of anticompetitive devices, all the while "respecting" each other's territory.
>
> * * *
>
> Japanese television manufacturers, particularly the defendants, operated as a cartel, setting prices for both the Japanese domestic market and the United States. They acted in concert, exercising market power through trade associations, industry committees, and other groups. In doing so, they intensified the competition which United States manufacturers experienced, while attenuating, if not eliminating, competition among themselves.

[26] Whether these assumptions amount to bias is a question to be considered by the trier of fact, after cross-examination, as it assesses the weight to be given an expert's opinion. One must acknowledge that some built-in bias is an inevitable by-product of the use of expert testimony in an adversarial process.

> That the cartel operated in domestic as well as export markets is emphasized. Control over prices in the domestic market, to which entry was effectively barred, provided the protective umbrella which enabled the Japanese firms to engage in predatory pricing abroad. If competition had prevailed in the domestic market, then predatory pricing in the United States would have been more difficult.
>
> Had free and fair competition prevailed between United States and Japanese producers, production capacity in each country would have adjusted properly to the size of the combined markets, and been allocated properly between the United States and Japanese industries. The size and profitability of each nation's industry would have been determined by free and fair competition, rather than by the Japanese cartel. Finally, Emerson/NUE would not have suffered the damages specified.[27]

In order to determine whether these conclusions are permissible expert testimony, we must proceed step by step through the report, examining the bases for the opinions rendered according to the principles discussed under F.R.E. 703, Part IIA, *supra*, as well as analyzing the assumptions, inferences, and conclusions as an aid to considering whether the opinion assists the jury as required under Rule 702. We reiter-

[27] Attached to this summary, Dr. DePodwin provided a chart entitled "Combined and Concerted Actions of Japanese Manufacturers, Particularly the Defendants, Gains Realized by Them and Adverse Impact on the United States Television Industry," which was also included in Part I of his report. In addition to the items listed in the title, the chart conveniently contains a column telling the reader what provision of the United States law is violated by each of the "combined and concerted actions" listed. Plaintiffs concede that Dr. DePodwin is not proffered for the purpose of rendering a legal opinion, *see* Pretrial Order No. 281 at 150, implying that they agree that the chart would be inadmissible. The point is worthy of mention, however, because it is characteristic of the advocatory nature not just of the DePodwin report, but of all the expert reports under consideration. Legal conclusions are never appropriate for expert testimony, *see, e.g., Marx & Co. v. Diners Club, Inc., supra*, and to the extent that these reports attempt such conclusions, they will be disregarded.

ate that we are *not* considering the admissibility of the reports as written, but of those opinions and background material contained therein that are of importance to our summary judgment and *in limine* determinations.

B. *Outline of the Economic Analysis*

Part I of the DePodwin Report outlines the economic analysis which underlies the conclusions reached. As such, it summarizes the evidence considered by the experts, sets forth some basic economic principles which inform the conclusions reached, and summarizes the ultimate conclusions. To the extent that this section summarizes either evidence or conclusions, we need not consider it separately here, but will address those opinions as they appear in detail in subsequent sections. To the extent, however, that it presents the analytical framework for the opinions to follow, it must be examined at this juncture.

Dr. DePodwin would plainly be permitted to testify concerning the methodology by which he reached his conclusions; we believe this to be undisputed by defendants. Such methodology would, of course, be relevant only to the extent that the data to which methodology is applied is deemed reliable under Rule 703, as discussed *supra*.

As part of the outline of the economic analysis, the report discusses, as background, some basic economic principles. Specifically, Dr. DePodwin outlines the practices of the classical cartel, citing economic literature, including the studies of Professor Ervin Hexner, and discusses the conditions necessary to make price discrimination possible and profitable. This material is also unchallenged except on relevancy grounds, and we find it plainly admissible as an expert "dissertation" permitted under the "or otherwise" clause of F.R.E. 702.

Thus, in sum, assuming relevancy, part I is admissible insofar as it lays out information. Because it is clear that Dr. DePodwin would not attempt to testify to his ultimate opinions in as conclusory a fashion as his summary might imply, we need

not consider the form of the conclusions presented here. Rather, we see this section as a preface to the weightier analysis to follow, and will consider the opinions in their subsequent context.

C. *Industry Background Materials*

Part II of the DePodwin report, entitled "Background on the Television Manufacturing Industry in the United States and Japan" and Part III, "Japanese Television Industry," set forth basic background materials in a straightforward discursive manner. Part II concentrates on the history of television technology and production, with emphasis on the fact that American firms were primarily responsible for technology under various patent agreements. Part III is heavily statistical, discussing industry concentration, production and export data, production capacity, investment, and facilities expansion for the industry as a whole and for individual defendant companies.

Defendants do not complain about the vast bulk of information contained in these two sections, except to question its relevance. Thus we will not tarry over the potential fine points of analysis, deferring judgments as to individual items until trial. We find the information useful as background, although we are not certain that an economist is necessary or qualified to expound to the jury on technological development. However, as a prologue to or basis for the economic analysis to follow, the background, which appears drawn from legitimate sources, can give the jury a framework within which to fit other pieces of evidence.

A few individual items in Parts II and III should be mentioned as problematic. Part II includes a discussion of the mechanics of patent licensing by the Japanese, reputedly organized through the Electronic Industries Association of Japan (EIAJ), a trade association. According to the DePodwin narrative, the Japanese manufacturers jointly negotiated their patent licensing agreements with United States firms, thereby

eliminating internal Japanese competition for imported technology. DePodwin Report at II-23 to II-26. This section is followed by a brief "Appendix to Part II" which explains that "[t]he radio and television industry has a notorious history of using patent licensing agreements to restrain trade." Because we consider these ideas to be of only tangential relevancy to the question of the unitary export conspiracy among the defendants charged in this litigation, or even of the alleged home market facet of the alleged conspiracy, because they are certainly insufficient to create a material issue of fact given the gravamen of plaintiffs' case, and because the defendants do not at this time seriously contest the underlying information, we will not address the Article VII issues related thereto.[28]

Part III, while primarily statistical and unobjectionable, contains two portions which must be excised. First, in connection with a discussion of capacity expansion and exports, the report opines:

> Two things are clear when we examine Japanese statements on adding to production capacity during the 1965-1970 period. One is that the companies sought to avoid competition with one another when adding to production capacity. The other is that the additions to capacity were intended largely to support increases in exports to the United States.

DePodwin Report at III-33.

There is plainly nothing wrong in and of itself with adding to capacity to support exports; to that extent the opinion is irrelevant if intended to support an inference of export conspiracy. The bald statement that the companies sought to avoid competition when adding to production capacity is supported solely by a statement by a single Japanese executive—a statement of otherwise doubtful admissibility as to that executive's company and inadmissible as to the other defendants.[29] DePodwin's opinion, coming as it does out of thin air, is simply unsupported either in the report or in the record, and cannot be admitted. At best, if the executive's statement were to be deemed admissible, its interpretation would be a matter for the jury to consider along with the other pieces of the puzzle, rather than a matter for expert analysis. It is simply not reasonable for an expert to base such a sweeping conclusion on a single disputed essay; nor is it helpful to the jury, in that there has been no application of expertise.

[28] We note, however, that the report relies heavily on such questionable sources as *Television Digest*, various unauthenticated internal documents of defendants, and minutes of the EIAJ of the type which we excluded from evidence in our Japanese Materials Evidentiary Opinion. The Appendix portion relies upon some plainly legitimate sources, but concludes with five pages lifted almost verbatim from plaintiffs' preliminary pretrial memorandum. There are thus significant problems under F.R.E. 703.

A second problem area in Part III discusses the alleged subsidization of Far East subsidiaries (in Korea, Hong Kong, and Taiwan) of Japanese manufacturers, in an attempt to imply that the Japanese companies' participation in the United States market was predatory. DePodwin Report at III-36 to III-43. This section is entirely supported by documents pro-

[29] The statement in issue, by Konosuke Matsushita, Chairman of defendant Matsushita Electrical Industrial Co., Ltd., as recited by DePodwin at III 33, reads:

> We must not have excessive competition for plants and facilities even if we do enter a period of prosperity. Of course we should expand equipment fully and steadily step by step. But, in the future, expansion that produces the effect of competition among rival companies must not be permitted. In a Japanese wrestling match, victory or defeat is important. But we do not compete for victory in business.
>
> In recent years, mass media has often reported on the rivalry among companies and predicted the victory or defeat of a company over the others. I think this is outrageous.

Even assuming that the quotation is accurate (the statement, as quoted by DePodwin, is found in an EIAJ publication entitled "Denshi Electronics" which was produced by Sharp), it is doubtful whether this statement would qualify as an admission against Matsushita. *See* Japanese Materials Evidentiary Opinion at pp. 98 n.71 & 254. At all events, the statement is plainly hearsay as to all other defendants, and plaintiffs, despite challenge to the document at pretrial evidentiary hearings, have laid no foundation for its admission as an exception to the hearsay rule. The several speeches and newspaper articles upon which plaintiffs rely in part to show intent to collude will be discussed in greater detail in our final conspiracy opinion.

duced in this litigation, and there are serious questions of admissibility under both F.R.E. 702 and 703.[30] Defendants do not strenuously urge an Article VII objection to this information, preferring to stress a relevancy objection. Accordingly, we shall defer consideration of this point until our decision on the conspiracy motions.

The crucial part of the DePodwin report begins with Part IV, to which we now turn.

D. *The Japanese Television "Cartel" and Its Operation*

1. *Introduction*

Parts IV and V coherently lay out for the reader the essence of plaintiffs' antitrust conspiracy case. The reader is not left in suspense about the conclusion to be reached, for Part IV is entitled "Japanese Television Industry Cartel," and Part V, "Operation of the Japanese Television Cartel." The conclusions reached in Part IV are starkly summarized in the first paragraph of the chapter:

> Japanese manufacturers of television receivers achieved their phenomenal success in exports, particularly to the United States, through concerted collusive action. The manufacturers colluded through various associations and committees. It will be shown that they engaged in a concerted drive to attain and keep a large share of the United States market by means of agreed upon predatory prices designed to eliminate domestic manufacturers. Japanese manufacturers, particularly the defendants in the Japanese Electronic Products Antitrust Litigation, priced exports to the United States well below the price at which they sold comparable products in their home market, they agreed to allocate United States customers

[30] The documents upon which the analysis rests include many internal memoranda of both defendants and non-parties to this litigation, the admissibility of most of which is challenged by defendants on both authentication and hearsay grounds, thus calling into question admissibility of the opinions based thereon under F.R.E. 703. Furthermore, the section is merely narrative, with a striking paucity of economic analysis, leading us to note its potential inadmissibility under F.R.E. 702 as well.

> among themselves, they freely exchanged information on their corporate production, inventories, shipments, and prices, and they engaged in many other acts designed to reduce, if not eliminate competition among themselves.

DePodwin Report at IV-1.

Part IV describes in detail the various groups and associations through which defendants are alleged to have conspired; Part V discusses the mechanics of the conspiracy. It is undisputed that the Japanese defendants were members of the various trade associations and groups delineated in the report; it is what occurred at those meetings that is in dispute, as well as the inferences to be drawn therefrom. Dr. DePodwin's format, which separates a description of the groups from a description of their operation, strikes us as somewhat awkward, and his order of description, which differs from that of plaintiffs PPTM and FPS, is not entirely logical. However those are matters of no importance and we shall proceed according to the organizational structure of the report. We shall not catalogue all of the materials relied upon by DePodwin in preparing his report, but we shall cover the highlights, quoting liberally when appropriate.

2. *Conspiratorial Groups*

Dr. DePodwin begins with a brief discussion of the Electronic Industries Association of Japan (EIAJ), an umbrella trade association of which certain Japanese defendants and numerous other corporations are members.[31] The EIAJ has a large number of committees relating to the television industry, including one which DePodwin identifies as the Committee of TV Exports to the U.S. We are informed that the EIAJ provided facilities for the Television Export Council, described in conclusory terms, without source reference, as the "administrative body of the manufacturers export cartel," and that the offices were the same as those of the Market Stabilization Council, "the body which implemented the domestic television

[31] Many of the non-defendant members are alleged to be co-conspirators.

cartel agreement." Except for the EIAJ membership list, which was produced in discovery in this litigation, none of this information is supported by any citations at this point in the report, although much of it is fleshed out in subsequent sections, which will be addressed as we reach them.

The report next launches into a detailed discussion of the Market Stabilization Council and a number of other industry groups alleged to have facilitated market control, among them the Okura Group, the Palace Group, the Palace Preparatory Group, the Tenth Day Group, the MD Group, and the Hibiya (or Twentieth Day) Group. According to DePodwin, the purpose of the Market Stabilization Council was to control the domestic market for electrical appliances, whereas the other groups, representing various levels in the corporate hierarchy, implemented that goal in the television industry by agreeing upon volume of production, price levels, projected volume, shipment, and inventory levels.

There are a number of problems with this narration, and we have no difficulty holding this portion of DePodwin's analysis to be inadmissible. First, with regard to the basis for the testimony under F.R.E. 703, except for the facts that the groups indeed existed and that executives of certain defendants were members and attended meetings thereof, matters which are conceded by defendants, all other matters are supported almost entirely by sources which were ruled inadmissible in our two previous evidentiary opinions. For matters related to the Market Stabilization Council, DePodwin relies entirely upon two sources: plaintiffs' answers to defendants' interrogatories and materials relating to an investigation into the Council's activities by the Japanese Fair Trade Commission (JFTC). Plaintiffs' answers to interrogatories, although sworn, are essentially statements of plaintiffs' contentions with respect to the Council, and, as such, are certainly not appropriate material to serve as a factal basis for an expert's opinion. We explained in detail in our Public Records Opinion that the JFTC investigation into the Market Stabilization Council's affairs was extremely preliminary, ending in a Rec-

ommendation Decision, or consent agreement, prior to the holding of any hearings, and that documents related to that investigation were not probative of the truth of the matters set out therein. Accordingly, we ruled the only document tendered, the Recommendation Decision, inadmissible. While it is unclear precisely what materials Dr. DePodwin considered from the JFTC record of this investigation, it is plain that his primary reliance was upon this Recommendation Decision, or consent agreement, which we have since found to be untrustworthy.

As to the other industry groups, the fact that representatives of the defendants participated in regular meetings is permissibly gleaned from defendants' answers to plaintiffs' interrogatories, and is, as we have noted, undisputed by defendants.[32] Information on which DePodwin bases his conclusions that the meetings were used to exercise market control, however, comes from more suspect sources. The most frequently referenced document, cited some sixteen times between pages IV-9 and IV-13, is the diary of S. Yajima, a Toshiba employee, which had been seized by the JFTC in its price-fixing investigation in the so-called "Six Company Case," and which is discussed in detail in our Japanese Materials Evidentiary Opinion. We ruled the diary inadmissible on a variety of grounds, mainly related to trustworthiness, in that same opinion.[33]

In addition, Dr. DePodwin consulted an "initial decision" or "draft of decision" rendered by the JFTC in the same case. That document was withdrawn from our consideration at the

[32] DePodwin also relies in part for this basic background information on certain testimony before the JFTC in connection with the so-called Six-Company Case, discussed in detail in our previous evidentiary opnions. In our Japanese Materials Evidentiary Opinion we ruled that only portions of this testimony were admissible, and at that against only six of the twenty-four defendants. With minor exception, all "export" references were excluded.

[33] DePodwin also relies upon other diaries which were excluded in the Japanese Materials Evidentiary Opinion.

evidentiary hearings, presumably because the full Commission, in an action taken subsequent to the issuance of the initial decision by the trial examiner, terminated the proceedings for lack of evidence.[34] We have no doubt that, had the document been considered, we would have ruled it inadmissible for reasons similar to those which informed our exclusion of a similar initial decision in a resale price maintenance case brought against Matsushita. *See* Public Records Opinion, 505 F.Supp. 1125, at 1181.[35]

The final sources of DePodwin's information related to the structure of industry groups are lectures and interviews by Konosuke Matsushita, Matsushita's founder and Chairman, to the effect that industry executives "have summit talks" to encourage cooperative management, and a report in the periodical *Industrial Japan* to the effect that industry stabilization is of concern to the industry. The personal views of one industry executive and an unsigned, heretofore unauthenticated periodical article, all of questionable independent admissibility,[36] simply do not appear to us to be the type of

[34] We discussed at some length in our Public Records Opinion the role of an initial decision (or draft of decision) in a JFTC proceeding. In essence, following hearings, the hearing examiner prepares a document which is fully reviewed by the Commission before official action is taken. In the Six-Company Case, the Commission refused to adopt the hearing examiner's draft. *See* Japanese Materials Evidentiary Opinion, 505 F.Supp. 1190, at 1209, n.2.

[35] In the resale price maintenance case, the initial decision was superseded by a consent agreement; in the Six-Company Case, the superseding document was a termination by the Commission. If anything, the Six-Company Case document presents a stronger argument for exclusion.

[36] At most, Chairman Matsushita's statement would be admissible only against Matsushita among the twenty-four defendants. *See* note 29, *supra*. We take this opportunity to incorporate by reference our frequent comment in the Japanese Materials Evidentiary Opinion to the effect that plaintiffs have now been victimized by their own pretrial and trial strategy of failing to take depositions to lay the foundation for the documents which they have proffered in the FPS, the authentication and admissibility of many of which defendants have challenged.

information reasonably relied upon by economists to determine whether firms agreed on price and output.

But even without deciding whether Dr. DePodwin placed "reasonable reliance" on any individual item, the entire section is so utterly dominated by materials which we have found to be totally unreliable — principally the JFTC materials and especially the Yajima diary — that under the principles developed in Section II, *supra*, the opinions based on such materials must be excluded as not reasonably based under F.R.E. 703.

It is arguably incorrect to view the materials considered by the experts as materials upon which they "relied." Instead, what they have actually done is set forth in an orderly manner the "evidence" before them. In so doing, they have in essence created for themselves a hypothetical question of a traditional sort, *i.e.*, they have laid out in narrative fashion the bases for their opinions, as gleaned from various sources. But at common law, a hypothetical question had to be supported by evidence in the record. *See, e.g., McCormick on Evidence* § 14, at 33 (2d ed. 1972). What has happened here is that plaintiffs have attempted, via the mechanism of an expert's report, to insinuate reams of otherwise inadmissible evidence into the record by having the expert "rely" on it and provide a dissertation on defendants' practices on that basis. This is a fallacy which crops up throughout all of the expert reports, and is one which we cannot countenance.

In his post-hearing affidavit, *see* note 24, *supra*, DePodwin seeks to justify his reliance upon the diaries, minutes of meetings, etc. by invoking the work of Professor Oskar Morgenstern:

> There is a vast body of important material currently used by economists which is non-numerical. It is either historical-descriptive in nature, or it consists of direct qualitative empirical observations by a given investigator who lives in a certain economic milieu or who participates in economic activities and business decisions. Some further information is derived from introspection, and this too has played a considerable role in the development of

> various branches of economic theory. All of these sources of information have, of course, various kinds of error for which allowance should be made, if only the source and extent of the error were known. This is of especial importance when this type of evidence is brought into contact with that which appears in numerical form. Such combinations are inevitable and are therefore highly characteristic of economics.

DePodwin affidavit at 1.5, quoting O. Morgenstern, *On the Accuracy of Economic Observations* 3 (2d ed. 1963). Dr. DePodwin continues:

> Numerous studies rely on the kind of economic evidence, such as diaries, memoranda, minutes of meetings, rationales for agreement, and other qualitative empirical information, found in the DePodwin Report and which Professor Morgenstern deems appropriate economic data.

To describe the diaries, minutes of meetings, etc. which we have excluded in the ~~second~~ opinion in this evidentiary trilogy as "direct qualitative empirical observations" is, in the wake of the *ratio decidendi* of that opinion, no less than farcical.[57] We

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[57] Such a description also lacks fidelity to Morgenstern's own prescription that allowance be made for "error." To the extent that DePodwin's reference to Morgenstern means that he maintains his opinion notwithstanding acknowledgement of reliance upon materials of questionable reliability, *see* point 5 at p. 1330, *supra*, he has gone far beyond the pale.

The parties have engaged in an extensive post-summary judgment argument exchange of correspondence regarding the integrity of Dr. DePodwin's report. We shall not chronicle that exchange here, but we do note the latest and most trenchant defense of Dr. DePodwin, that contained in the letter of November 19, 1980, from Edwin P. Rome. In justifying DePodwin's reliance upon materials claimed to be "historical-descriptive" in Morgenstern's terms, Mr. Rome writes:

> Defendants have mistakenly assumed that the "economist" and the "investigator" cited by Morgenstern must be one and the same. Yet the Japanese and the American executives who participated at meetings where business decisions were made are bona fide observers of economic evidence and the notes, letters, and diaries generated at or as a result of such meetings are proper qualitative empirical observations or records of the conduct and agreements reached during them. If economists were restricted to the use of material generated during the course of their personal participation in economic activities or business decisions,

reject DePodwin's justification and hold that his exposition and opinions regarding conspiratorial groups, recorded in his report at IV-1 to IV-21, are inadmissible.

As an alternative and co-equal basis for our holding of inadmissibility, we find these sections relating to conspiratorial meetings to be impermissible as expert testimony under F.R.E. 702.

What Dr. DePodwin has done is to step into the shoes of the factfinder and set forth in narrative fashion what he believes the "evidence" — *i.e.*, the materials he consulted — shows. He has described the Market Stabilization Council and the various industry groups as they appear from plaintiffs' documents, accepting the interpretation of those documents that plaintiffs have espoused throughout this litigation in their briefs and arguments, and concluding that certain activities of a conspiratorial nature — primarily exchange of information — occurred at industry group meetings. These activities are said to have consitituted exercise of market control in the Japanese domestic television market. There is in this exposition no evident application of any economic expertise whatsoever. Dr. DePodwin, in the process of reaching his conclusion, has not instructed us in any degree in "the ways of his work." Instead, he has done exactly what the jury is supposed to do—he has sifted through materials provided by plaintiffs, analyzed them factually, and reached certain conclusions regarding culpability of the defendants. This is precisely the oath-helping "conspiracyology" defendants object to so strenuously. It lends an

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> or restricted to things directly observed in a certain milieu, the majority of economic treatises now existing would not have been written. Under this narrow premise, advanced by defendants, economists would be barred from writing studies in the field of economic history; works in the field of institutional economics would disappear; and one generation of scholars would be barred from analyzing and/or reviewing the economic facts of prior generations.

The obvious answer is that an economist would be barred only from serving as an expert witness when he grounds his opinion on such matters, where they are demonstrably untrustworthy, and not from otherwise practicing his profession.

unwarranted aura of scientific reliability to the arguments of plaintiffs' attorneys. We agree with defendants that such testimony neither utilizes special expertise nor assists the trier of fact, and that it is therefore inadmissible.

The groups discussed so far concerned themselves, in plaintiffs' submission, with control of the Japanese domestic television market. As will be explained at length in our forthcoming opinion addressed to the issue of conspiracy, plaintiffs contend that this "Japan-side" conspiracy to fix high prices in Japan was essential to the scheme to flood the United States market with electronic products priced at an artificially low level, in that it provided defendants with the necessary financial cushion. The balance of Chapter IV of the DePodwin report shifts its focus from the home market to the alleged export conspiracy, and it is to that claim of plaintiffs that we now turn.

3. *The Manufacturers' Agreements and the Japan Machinery Exporters Association (JMEA) Rules*

For reasons that will appear, DePodwin's discussion of the Japan Machinery Export Association (JMEA) and its alleged mechanisms for controlling the export market suffers from many of the same faults as the description of home market groups.

Defendants do not dispute membership in the JMEA; as with the domestic industry groups, however, they dispute the motivation for and results flowing from their participation in JMEA activities. DePodwin summarizes his discussion of the JMEA as follows:

> The JMEA served as a vehicle through which certain aspects of defendants' controls over exports were organized and implemented. For example, defendants utilized the JMEA as a forum for the discussion and coordination of the pricing of consumer electronic products exported to the United States. They entered into agreements and adhered to rules expressly designed to implement such agreements, the objectives of which were to facilitate the coordinated and concerted dumping campaign in consumer electronic products exported to the United States. The export program included the setting of price levels of television receivers and radios to be exported to the United States, limitations on the number of United States customers to whom each manufacturer or exporter may sell, customer boycott provisions, joint standardization of consumer electronic products, establishment and allocation of quotas for export of consumer electronic products, and the setting of export goals for consumer electronic products.

DePodwin Report at IV-23.

The JMEA supposedly achieved control through two primary mechanisms: "Manufacturers' Agreements," referred to by plaintiffs as "cartel agreements," and rules of the association.[38] These are the only sources relied upon by Dr. DePodwin in this section of the report. The admissibility of the Manufacturers' Agreements and the JMEA rules is not contested, and we can assume that they are appropriate bases for Dr. DePodwin's opinion under F.R.E. 703. We nevertheless find the opinions based thereon—or interpretations thereof—impermissible expert testimony according to the standards developed under F.R.E. 702.

As with the discussion of industry groups outlined in the previous section, DePodwin analyzes the evidence to be pre-

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[38] The agreements discussed were all entitled "Agreement on Manufacturers' Domestic Transactions Relating to Exportation of Television Sets." There were seventeen such agreements, covering consecutive time periods between 1963 and 1973. The JMEA rules that are the subject of DePodwin's analysis were in existence during the same ten-year period. Defendants concede the existence of these agreements and rules, but have long maintained that plaintiffs have no standing to attack them, contending that the agreements (also known as "reference price agreements" or "check-price agreements"), which established *minimum* prices for export of television receivers into the United States, could not have injured U.S. television manufacturers. Furthermore, defendants contend that the agreements were entered into at the mandate of the Japanese Ministry of International Trade and Industry (MITI) as part of MITI's industry regulation to avoid upsetting trade relations with the United States, and that the agreements are thus protected under the doctrines of act of state, sovereign compulsion, and international comity.

sented to the jury and tells the reader—or the jury—what it means. The analysis is not economic, but factual. Phrases such as "[o]ne of the principal purposes of the Manufacturers' Agreements was . . ." (IV-25) and "[t]he general purpose of the 'Manufacturers' Agreements' was . . ." (IV-24) abound. Most of the section is made up of quotations from and paraphrases of the agreements and JMEA rules, with occasional conclusory terms appended to "explain" what these documents mean.

A few examples will suffice to illustrate the problems rampant in this portion of the report. A subsection entitled "Television Export Cartel Agreements," which cited only plaintiffs' PPTM, begins by defining the "general purpose" of the Manufacturers' Agreements," which DePodwin describes as "written price agreements," as being "to govern price levels and conditions of sales on transactions between Japanese manufacturers of television receivers and the exporters of such receivers to the United States market." After discussing the "fact" that the primary target of the agreement was the United States, a fact gleaned from a quote from article 4 of the agreement and conceded by defendants, the report continues:

> One of the principal purposes of the Manufacturers' Agreements was to create an active forum for discussions of and agreement upon the price levels of television receivers for export to the United States and to implement the agreed on relation between such price levels and those established during price-fixing activities relating to television receivers sold by them in Japan. The question of prices was the specific subject of Article 8, which provided that the Television Export Council, the cartel's policing body expressly created to implement the Manufacturers' Agreements, had the ability to discuss and determine the price levels for television receivers for exportation to the United States.

DePodwin Report at IV-25. DePodwin's opinion, framed in terms of these conclusory statements, is supposedly "proved" by the ensuing direct quotation from the agreement:

(Prices)

Article 8

1. The Council, if it is going to establish minimum selling prices to export businessmen of these goods which are specified in Attached Schedule 2, or amend same, shall serve prior notice upon the Minister of International Trade and Industry.

2. The parties to this agreement shall not sell to export businessmen those goods which are specified in Attached Schedule 2 at prices lower than the prices established in accordance with the above paragraph.

3. The parties to this Agreement shall strive to refrain from such dumping as may cause a market disturbance in the United States.

Id. (footnotes omitted).

Turning from the "cartel agreements" to the JMEA rules which allegedly governed enforcement of the agreements, DePodwin informs us:

> The provisions fixing the export price levels for television receivers to be exported to the United States are contained in Article 10 of the 1963 JMEA Agreements. Article 10 makes specific reference to the price levels established in the television "Manufacturers' Agreements" and employs them as the basis on which the export price is to be mechanically calculated. Article 10 sets the television export price levels at the prices set by the "Manufacturers' Agreements" plus commissions and expenses and specifies that notification be given to the Television Export Examination Committee of the JMEA of these prices:
>
> "*(Export Prices)*
>
> Article 10
>
> "The members of the Association, when they export to the applicable area those models of applicable goods for which the shipment prices have been established by the Agreement on Manufacturers' Domestic Transactions Relating to Exportation (hereinafter referred to as the 'Manufac-

> turers' Agreement'), shall export at a price higher than the sum of said shipment price plus the appropriate expenses and commissions relating to the exportation; and furthermore, shall notify the Association of the export prices (FOB) for the goods."

DePodwin Report at IV-32 (footnote omitted).

A particularly striking example of DePodwin's conclusory style appears on page IV-33, where he unequivocally states:

> The JMEA "Rules" on television receivers were designed to eliminate all competition among the defendants in the export of television receivers and to concentrate the injurious impact of defendants' joint, manipulated pricing levels against United States manufacturers. One of the principal objectives of the defendants' conspiracy, as applied to television exportation, was to get the business, to achieve "steady expansion of exportation" to the United States, to capture increasingly larger shares of the total sales in the United States utilizing what defendants termed "*a system of harmonious exportation*." Examples of the techniques used unlawfully to achieve this result may be found in the cartel members' employment of these trade restraints:
>
> 1. the so-called "Five-Company Rule" for television receivers;[39]
> 2. the prohibition against changes in export customers during the period of the JMEA "Rules"; and
> 3. the restriction prohibiting two cartel members from selling to the same customers.

The report then goes on to discuss the three techniques listed above in a manner similar to the sections quoted *supra*. Further quotation would be redundant, for it is plain that the "analysis" undertaken in this section of the DePodwin report in no way resembles economic analysis. It cannot possibly be construed as instructing the trier of fact in "the ways of [DePodwin's] work." This is factual analysis: DePodwin has

[39] DePodwin again discusses the Five-Company Rule in Chapter V. *See* p. 1349, *infra*.

quoted the documents—documents we have assumed to be in evidence and which are of a type that is traditional fodder for jury deliberation—and has overlaid those quotations with his own gloss on their meaning. There is nothing in this section which aids the trier of fact in drawing any conclusions that it could not independently draw, and there is much that is potentially highly misleading.[60] According to the principles outlined in Part II.B., *supra*, this section must be deemed to be the work of an oath-helper, and therefore inadmissible under F.R.E. 702.[61]

4. *Information Exchange and Voting*

Part V of the DePodwin report, which discusses the operations of the Japanese television "cartel," begins with a discussion of the information allegedly exchanged among members of the groups described in Chapter IV. The chapter describes "in detail the collection, tabulation, and dissemination of information on production, inventories, and domestic and export shipment." DePodwin Report at V-1. Once such information was exchanged, members were in a position to vote "regularly on the volumes of production and shipments, adjustments in production, and inventory levels." *Id.*

DePodwin's discussion of information exchange is comprised entirely of references to certain reporting forms, produced by

[60] We will deal at length with this point and with the legal sufficiency of this material in our opinion addressing the conspiracy issues.

[61] Alternatively, despite DePodwin's reliance upon trustworthy documentary sources, it can be argued that his opinions must nonetheless be excluded under F.R.E. 703 because his assumptions concerning those documents are demonstrably false, in that the conclusions do not follow from the documents. For example, the conclusion suggesting a broad range of export price fixing activity which DePodwin based upon Article 8 of the Manufacturers' Agreements and which we quoted at 1344-1345 *supra* constitutes a misleading version of the minimum price language on the face of the agreement. Moreover, as will be seen *infra*, his interpretation of the Five-Company Rule is contrary to the record developed before us. Thus, even his factual analysis—his practice of conspiracyology—is flawed. However, we need not reach this 703 analysis.

the defendants in this litigation, which were submitted by the Japanese manufacturing defendants to the EIAJ on a regular basis, and which detailed monthly production, shipment, export, and inventory information, as well as references to EIAJ's monthly industry-wide summary forms. We have not considered the admissibility nor the trustworthiness of these documents, and for the purpose of this opinion we will assume their independent admissibility and their reliability for Rule 703 purposes. With regard to voting by the defendant companies on shipment, production, and inventory levels, however, DePodwin relied upon three very different sets of documents. The first is the Yajima diary, which was discussed *supra* in conjunction with our ruling on the meetings of conspiratorial groups. The second is a group of documents which DePodwin refers to as "Toshiba notes on meetings" (V-19), and which he has included in an appendix. The documents which he has appended, however, do not fit that description; most of them are pages from the diary of M. Yamamoto, a Hitachi employee, which we held inadmissible in the Japanese Materials Evidentiary Opinion on the same grounds as the Yajima diary. Two additional documents appended under the rubric of "pages from Toshiba notebooks" are unauthenticated documents produced by Hitachi, one purporting to be minutes of a meeting of the Tenth Day Group, and the other a meeting notice and agenda for a meeting of the MD Group apparently circulated by Nippon Columbia Co., Ltd. The final document upon which Dr. DePodwin relies in this section is a similarly unauthenticated document produced by the Japan Victor Co. regarding balloting results of the MD Group in 1970. This is not the Japan Victor document excluded in our Japanese Materials Evidentiary Opinion, but a document we have not before considered. All of these latter documents suffer from the same flaws as the numerous documents excluded in the Japanese materials Evidentiary Opinion.

For information on joint forecasting, DePodwin uses three sources. He quotes verbatim the "Shimizu memorandum," which we ruled inadmissible in our Japanese Materials

Evidentiary Opinion. He quotes from a statement by Konosuke Matsushita, similar to that which we discussed *supra*. Finally, he refers to a document which we have not previously considered, one which he describes as "prepared by or at the behest of the TV Export Council" entitled "The Status of TVs shipped to the United States (First Half of 1967)."[42] This document, produced by Matsushita, has never been authenticated, and it suffers from the same flaws as other documents which we have already ruled inadmissible.

This segment is dominated by reliance on untrustworthy materials, either already excluded or demonstrably excludable; hence, the opinions expressed therein are inadmissible under Rule 703 for lack of reasonable reliance. Moreover, the entire section covering information exchange, voting, and forecasting is inadmissible under F.R.E. 702. This section is the same type of narrative, factual analysis of documents otherwise potentially before the court, without the use of special expertise which could assist the trier of fact, as discussed in the previous section. DePodwin has not analyzed the information contained in the reporting forms and other documents; he has merely recited that information, telling the trier of fact what he believes it represents. This is not "helpful" within the meaning of Rule 702.

We wrap up our discussion of information exchange with a final illustration, one paragraph on page V-2, which reads:

> As pointed out in Part I, Outline of the Economic Analysis, a cartel's efficacy is enhanced if its members are provided with detailed information to reduce uncertainty, promote collusion, and police the observance of cartel agreements. The Japanese television cartel collected, organized, and distributed an extraordinary amount of information to its members.

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[42] We note that this document is not in the document depository and should not therefore be considered under PTO 219. Nor was it tendered at the pretrial evidentiary hearings. DePodwin has included a copy, with translation, in an appendix.

The first sentence of this paragraph refers to Part I of the report, which outlined the economic methodology in reaching a conclusion, and as such we believe it to be permissible expert testimony under Article VII. The second sentence, however, is not permissible expert testimony for the reasons above discussed: it is a factual conclusion totally within the province of the factfinder. If there were at trial sufficient evidence in the record to support a finding in accordance with the second sentence of the quoted paragraph, the expert could assume the truth of the evidence presented and base a conclusion thereon. However, in this situation, the expert has not *assumed*, based on evidence in the record, that the Japanese defendants performed certain acts; he has simply categorically stated so. This he may not do.

5. *Price-Fixing Activities in Japan*

In the next section of the report, "the fixing of prices for the domestic market by the cartel is described in detail. It shows the extent to which prices, and wholesale and retail margins were rigged for the benefit of cartel members." DePodwin Report at V-1. Plaintiffs have contended that an agreement to fix high prices in the Japanese domestic market is of importance to the alleged export conspiracy because it enabled the defendants to amass a "war chest" to fund their low-price entry into the American market.

This section is inadmissible on both F.R.E. 703 and 702 grounds. First, with respect to Rule 703, the entire discussion is based upon documents related to the "Six Company Case" before the Japanese Fair Trade Commission, discussed *supra* and in our previous opinions. Essentially, what Dr. DePodwin has done is to second-guess the JFTC, for that body, after reviewing the same materials examined by DePodwin, terminated the proceeding against the six companies for lack of evidence. As we discussed at length in our Public Records Opinion, preliminary investigative reports that are superseded by contrary official actions, as in this situation, are inadmissible because they lack the necessary indicia of trustworthiness

required to come into evidence under an exception to the hearsay rule. The same reasoning compels us to find that the investigators' reports are not reasonably relied upon by an expert witness under F.R.E. 703.

In addition to the investigators' reports, DePodwin relied in this section upon the diaries of defendants' officials which had been seized by the JFTC in conjunction with the Six Company Case, virtually all of which were ruled inadmissible on trustworthiness grounds in our Japanese Materials Evidentiary Opinion, and which we have discussed *supra*. Finally, Dr. DePodwin relied upon testimony before the JFTC and protocols submitted to the JFTC, again in conjuntion with the Six Company Case. We ruled these materials to be admissible against some defendants, with the exception of certain "export references." However, whatever reliance DePodwin may have placed on these materials is totally overshadowed by his reliance on the documents we have said to be unreliable. This segment of the report is so permeated by reliance upon untrustworthy materials that it cannot be admitted under F.R.E. 703.[43]

Moreover, this section is written in precisely the same discursive factually informative style as those sections discussed previously. Once again, we are told "what happened" with reference only to documents otherwise before the court. Once again Dr. DePodwin has stepped into the shoes of the factfinder, rendering his opinion inadmissible under F.R.E. 702.

6. *Export Reference Prices*

Having already, in Chapter IV, discussed the Manufacturers' Agreements to which defendants were signatories, Dr.

[43] We note that one small segment of this section, at pp. V-29 to 30, presents calculations showing that an agreement on minimum retail prices coupled with common retail and wholesale profit margins, plus common rebate policies, is equivalent to an agreement on the exfactory price. This analysis, if relevant, would be admissible, but only if there were sufficient extrinsic evidence in the record to support the premise.

DePodwin in this section examines the prices allegedly established by those so-called "check-price" or "reference-price" agreements. He informs us, first, that reference prices were set by the TV Export Council through trading companies, but he offers no support for that statement. He next recites, in tabular form, reference prices established pursuant to the Manufacturers' Agreements for July and August 1964, basing those prices upon notifications to MITI.[44] He continues reciting reference prices as contained in his Table V-6 and V-7,[45] and compares those prices with domestic prices, making adjustments for wholesale and retail margins, and concluding that the domestic prices were considerably higher.

DePodwin relies for domestic prices upon the draft of decision in the Six Company Case, which we have discussed *supra*. While we explained that that document would not be independently admissible, and that it could not support an expert's inference of conspiratorial activity, we cannot say that the price levels contained therein are unreliable. Some of the price data received by the JFTC came from testimony and protocols, which we have found to be admissible and upon which an expert could reasonably rely. We do not know where the rest of it came from. Accordingly, we think this calculation might be reliably based and admissible. In order for us to rule

[44] Defendants do not dispute that they reported to MITI pursuant to the Manufacturers' Agreements. Indeed, their sovereign compulsion and act of state defenses, *see* n.38, *supra*, rest in part upon the reporting requirement.

[45] The figures gathered in Tables V-6 and V-7 were drawn from two types of sources. Some of the prices were drawn directly from schedules attached to the Manufacturers' Agreements, which we have posited to be reliable. The rest, however, were obtained from internal Sony memoranda which were not addressed in our pretrial evidentiary hearings. We note that plaintiffs have laid no foundation for admission of these documents, and they are plainly of a piece with the many unauthenticated, hearsay documents excluded in our Japanese Materials Evidentiary Opinion. Nevertheless, because DePodwin's calculations are based also on the Agreements, and because the check price levels are generally not disputed, we will not attempt to determine whether his opinion as to the check price levels is dominated or pervaded by his reliance on questionable documents for F.R.E. 703 purposes.

definitively, however, the basis for the domestic price levels would have to be more explicitly stated. We thus defer ruling upon the admissibility of the calculations based upon these prices.

DePodwin goes on to point out that his estimates are supported by the Yajima diary. That paragraph is inadmissible under F.R.E. 703, for reasons which need not be reiterated.

7. *Rebates and Kickbacks*

After discussing the allegedly fixed export prices, Dr. DePodwin continues to narrate plaintiffs' theory of the case by explaining that defendants did not actually sell their products in the United States at that fixed price. Instead, they allegedly engaged in a scheme of discriminatory rebates and kickbacks. The evil of this sytem, in DePodwin's submission, was that it "enabled defendants to win the patronage of special customers, and to take sales from American manufacturers." DePodwin Report at V-39.

This section of the report describes the mechanics of the rebate system, discussing the need for fictitious customs declarations, overbilling and underbilling procedures, and the various euphemisms designed to "cover up" the rebate practices. He details which customers supposedly received rebates, and suggests that the "cartel members" were aware of one another's rebating systems and that all parties knew the practice to be illegal.

We will again pass over the Rule 703 issue presented by the rebate discussion, noting only that the source most frequently cited is that compendium of lawyers rhetoric, Plaintiffs' PPTM. Dr. DePodwin claims, at V-40, that there is "abundant evidence to support" his assertions, and that he has referred to only a small part of the available evidence. We will assume for F.R.E. 703 purposes that Dr. DePodwin reasonably relied upon the materials which he examined. However, this discussion repeats the vices of previous sections by merely reciting the evidence which the factfinder would have before it,

explaining, as one subheading at V-40 describes it, "How the System Worked." This is factual analysis, which usurps and derogates the function of the factfinder, and is accordingly inadmissible under F.R.E 702.

8. *Five-Company Rule*

The "Five-Company Rule" refers to a provision of the previously discussed JMEA rules, in effect from 1967 to 1973, which restricted each Japanese exporter to five U.S. customers. The rule was enforced by a registration and reporting requirement. Once again, DePodwin merely describes the rule and its use. The existence of and adherence to such a rule is not a matter which requires the application of specialized expertise, but is instead a matter uniquely within the competence of the factfinder. Factual recitation such as that provided by Dr. DePodwin is not helpful to the trier of fact, hence excludable under F.R.E. 702.[46]

We note that once independent evidence supports a finding that such a rule was adhered to, an expert could appropriately opine as to such a rule's potential effects on competition. This type of economic analysis is what DePodwin contemplated in his Outline of Economic Analysis in Chapter 1, discussed *supra*.[47] It is not, however, what he has done.

[46] We have already posited the reliability of the Manufacturers' Agreements and the JMEA rules, upon which DePodwin relies in this section. *See* p. 1343, *supra*. We assume that he also relied upon reporting and registration forms, although he did not explicitly so state; because it is uncertain what materials DePodwin consulted, and because this section is inadmissible under F.R.E. 702, we will not address the F.R.E. 703 question. We note, however, that the Five-Company rule did not operate to restrict competition in the manner DePodwin suggests, for American subsidiaries of the Japanese manufacturers could be included as one of the five customers. The subsidiaries could then sell to anyone. Moreover, to the extent that the rule limited the number of Japanese manufacturers who could sell to an American importer, that could only keep prices up, benefiting plaintiffs.

[47] An expert may not, of course, so testify in derogation of the facts. *See* note 46, *supra*.

9. *Summary*

Although we have dissected each discrete section of chapters IV and V of Dr. DePodwin's report, we still believe it would also be useful to examine the overall thrust of the opinions expressed in those chapters, as well as the manner in which they are expressed. What DePodwin has in essence done is to examine the myriad documents supplied to him by plaintiffs' counsel, to quote liberally from those documents, and to conclude, "Aha! Cartel! Conspiracy! Illegal concerted action!" Defendants maintain that a conclusion of conspiracy is never appropriate for an economist to draw, pointing out that they have, despite diligent effort, found no case which permitted an expert to testify in such manner. Drawing a distinction between conduct of defendants and industry structure, defendants offer the following quotation, which we find highly useful:

> The role of the economist as an expert depends upon the emphasis of the various antitrust statutes, with the scope of that role widening as the focus shifts away from conduct and towards structure or performance. An emphasis upon conduct will focus the attention of the trier of fact . . . upon whether particular acts were committed by the defendant. *(Collusion, for example, is not particularly the subject of economic expertise.)* In contrast, an emphasis upon the structure of an industry or firm or upon the performance of an industry—or of a firm within an industry—will focus the attention of the trier of fact upon economic issues that are the special subject of economic expertise.

O'Hara, "The Economic Expert in the Antitrust Arena," 12 *Antitrust L. & Econ. Rev.* 17, 19-20 (1980) (footnotes omitted) (emphasis added).

We need not decide whether an expert may ever testify that, in his opinion, based upon his economic analysis of certain behavior of defendants, a conspiracy exists, for, as we have discussed in some detail, Dr. DePodwin's analysis adds no increment of economic expertise which would aid the jury, and his analysis is further flawed by reliance upon a considerable body of untrustworthy materials. In short, there is no "economic value added."

In an apparent effort to shore up his waning credibility in the wake of the summary judgment argument, Dr. DePodwin submitted the affidavit described in note 24, *supra*. Noting the paucity of documentary evidence of conspiratorial conduct, he asserts that "[w]here such evidence exists it is widely quoted in economic textbooks."[48] Dr. DePodwin invokes two examples to illustrate this point. First he notes that in his discussion of agreement among sellers, Professor Richard Caves stated:

> In the United States, the antitrust laws discussed in Chapter 6 make cartel agreements illegal in most industries. However, the law enforcers continue to turn up a number of less extensive agreements involving price fixing among competitors and the division of markets, the latter especially in connection with bids for United States government contracts. The most spectacular price-fixing conspiracy to come to light in recent years involved the companies making heavy electrical equipment. . . ."

Caves, *American Industry: Structure, Conduct, Performance* 56 (4th ed. 1977). Second, he quotes Professor Fritz Machlup, who reported the connection between the notorious "Gary dinners" and Adam Smith's famous statement on sellers' agreements:

> The gentlemen's agreement holds its special place in the history of collusion chiefly for two reasons. One is the famous statement made by Adam Smith in 1776 and quoted with great regularity in all discussions of this kind. He said: 'People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or on some contrivance to raise prices.' The other reason is the fame of one of the best known American examples of such gentlemen's conversations, the so-called Gary Dinners, where the leaders of the steel industry met from time to time, during the years 1907-1911, to discuss—for "merriment and diversion"—by way of after dinner speeches, the market situation and the most appropriate prices for their products. Since price-fixing agreements were unlawful in the United States, those gentlemen believed themselves to be within the law when they avoided formal agreements. But if the main speaker submitted that the market situation warranted, in his humble opinion, a price of so and so many dollars, and if the next speakers expressed their belief that the main speaker, who incidentally was usually the biggest steel boss, had shown perfect understanding of the situation and that they saw eye to eye with him, the dinner party was likely to be a lasting success (giving indigestion only to the non-invited public)."

[48] He continues.

> Thus, while discussing collusion, cartels, and conspiracy, economists frequently rely on two landmark cases of collusion among business executives: The notorious "Gary dinners" and the heavy electrical equipment conspiracy.

F. Machlup, *The Political Economy of Monopoly. Business, Labor and Government Policies* 87-88 (1952) (footnote omitted).

Dr. DePodwin seems, however, to ignore, or at least to blur, the distinction between the role of the economist as historian and his role as social scientist, particularly the most rigorous application of that role, where he acts as an expert witness, duty bound to apply economic analysis to demonstrated facts. We have encountered economists of the caliber of Dr. DePodwin in their academic milieu, and, knowing their fetish for rigorous analysis, cannot conceive of them (or of Dr. DePodwin in his academic role) seriously positing economic conclusions based upon the kind of evidence upon which Dr. DePodwin relied in his report. Although he has now disclaimed reliance on the diaries of Yajima and others,[49] that disclaimer cannot eradicate the pervasive and indelible imprint of those documents upon his report. In short, Dr. DePodwin's adaptation of the

[49] In his post-argument affidavit, DePodwin averred:

> In the preparation of the DePodwin Report the experts did not rely simply on the minutes of meetings, diaries, and other information and documents to which defense counsel object in order to reach conclusions about conspiracy and the occurrence of joint actions which restrained trade and attenuated competition among Japanese manufacturers and exporters of television receivers. As noted above, the report contains a wealth of economic facts and analyses which were used to reach these conclusions.

See also pp. 1341-1342, *supra*.

universe of economic literature, in which generally but loosely stated historical descriptions have an appropriate role, to the kind of analysis required of expert opinion in this case can create only a kind of ersatz economic science which Rule 703 cannot cognize.

Dr. DePodwin also defends his use of the term "cartel" and his conclusion of concerted action by defendants. His utilization of the studies of Professor Ervin Hexner on cartel behavior is the subtlest, and in some ways the most significant, aspect of his report.[50] Throughout the report, DePodwin refers to the export arrangements into which the Japanese manufacturing defendants and others entered under the aegis of MITI, *see* n.38, *supra*, as cartel. He buttresses this usage in his affidavit by a number of references in which commentators and governmental and international agencies have referred to the activities of the Japanese manufacturers, defendants and others, who were signatories to the Manufacturers' Agreements, as a cartel.[51] What DePodwin then does is to interpose the historical notion of a cartel between the evidence and the ultimate conclusion of a violation of section 1 of the Sherman Act. The unstated premise of this argument, unsupported in law, is that anything which can be called a cartel is *ipso facto* violative of the Sherman Act. Building a great scaffolding upon that unstated premise, he also says that we have been studying cartels for years; this is a classical international cartel which fits the historical pattern, ergo there must be an antitrust violation.

This approach is more than subtle. It is clever, but it is also legerdemain. We cannot permit this or any case to be determined by a tyranny of labels. Rather, we must look at actual facts, *i.e.*, at the actual arrangement and its effects. That is what we have done *supra* in determining the admissibility of

[50] We touched on this aspect of the report briefly in our discussion of the outline of DePodwin's analysis, *supra* at 1336-1337.

[51] Those references are themselves inadmissible, but we will assume here that they are within the ambit of Rule 703.

opinions expressed in Dr. DePodwin's report, and what we shall do in terms of the motions for summary judgment and the preliminary determination (under F.R.E. 104(a)) of the sufficiency of conspiracy proof. In short, no talismanic significance attaches to the use of the term "cartel."

On the related question of the use of legal conclusions such as "concerted action" and "conspiratorial," DePodwin responds that he used such terms because he found

> numerous documents which showed that the setting of such things as Check Prices, Bottom Prices, was done not individually, but jointly by companies whose executives met for these purposes. Examples of some of these documents are referenced in Parts IV and V of the DePodwin Report.

But as we have explained *supra*, these are for the most part documents which have been excluded because they are untrustworthy. Moreover, with respect to the "agreements" as to the Japanese home market, DePodwin has either ignored or taken a one-sided view of what transpired at meetings of the various industry groups, parroting the rhetoric of plaintiffs' lawyers.

Apparently aware of the vulnerability of this approach, Dr. DePodwin again invokes the writings of Professor Machlup:

> Sensitive readers may accuse us of attempting to use loaded words, since "collusion" is sometimes used with an undertone of condemnation and with an allusion to deceit, fraud, or trickery. Let us make it absolutely clear that no ethical connotation is here intended and that *the word as used in economic analysis is meant to be neutral as to ethical judgments and unprejudicial as to legal consequences*.

F. Machlup, *The Economics of Sellers' Competition* 433 (1952) (Emphasis added by DePodwin) (footnote omitted).

Adapting this Machlupian passage to his own stewardship, Dr. DePodwin writes:

> The analyses and judgments on which such conclusions were based were economic not legal, as evidenced by the

> report and the documents upon which it is based. Moreover, it is not out of order for economists to characterize business actions as "illegal" or as "violations of law" since key issues in antitrust law are matters of economic judgment. . . . Next, the standard texts in industrial organization, that area of economics which covers restrictive trade practices and other departures from competition, abound in references to antitrust laws. See, for example, F. M. Scherer, *Industrial Market Structure and Economic Performance* (Chicago, Illinois: Rand-McNally, 1980, second edition). Therefore, the economic experts did not see it inappropriate to render economic judgments on the defendants' joint actions and the United States antitrust laws.

It was once observed, whimsically of course, that saying something three times makes it so. But to say three times or nine times, in the present context, that Dr. DePodwin has not made a legal judgment (or, more precisely, to say that he has made a "neutral judgment unprejudicial as to legal consequences") is to belie reality. As we have explained, these judgments made by DePodwin, largely on the basis of expressly excluded evidence, are those not of an economist, but of a conspiracyologist, and are not cognizable in evidence in this court.

E. *The Price of Japanese Television Receivers in the United States and Japan*

1. *Price Comparisons.*

Part VI of the DePodwin Report consists of three alternate sets of calculations which purport to compare the defendants' prices in the Japanese domestic market with their prices in the U.S. market. Appendix B to Part VI consists of a construction offered to show that four of the defendants sold their products in the U.S. at prices which were below their costs. We discuss the Appendix B cost construction *infra*.

The First price analysis in Part VI sets forth a comparison of average prices on (Japanese) domestic sales with average prices on export sales of television receivers, by screen size categories, for the Japanese manufacturing defendants, Matsushita (MEI), Melco, Sony, Hitachi, Sanyo, Sharp, and Toshiba. The calculations of average prices were made by the firm of Morris R. Cohen & Co., another of plaintiffs' expert witnesses.[32] Average domestic prices in each case are derived by dividing the monetary value of sales to each company's first-line domestic distribution company, less returns, by the total number of units sold, less returns. Average export prices are derived by dividing revenues from sales by each company to its export subsidiary, agent, or customer by the total number of units exported, less returns if any. Although Dr. DePodwin performs separate analyses of color and of black-and-white television receivers, his analysis does not otherwise distinguish among different models in the same screen-size categories. According to DePodwin, this analysis reveals that the domestic price exceeds the export price in all cases, by amounts which range from a few percent to more than 100% of the export price.

The second price analysis, based on the technical comparison of domestic and export television models prepared by plaintiff Zenith Radio Corporation, is a comparision of the prices of domestic models and of export models which Zenith's engineers found technically comparable. *See* Opinion and Order (1916 Antidumping Act), 494 F.Supp. 1190, 1203-04 (E.D.Pa.1980), *appeal pending*, No. 80-2080 (3d Cir.) (explanation of technical model comparisons). The basic sources of price data for sets sold in Japan were defendants' answers to plaintiffs' Interrogatories No. 45 and 46(c) and Supplemental Interrogatory No. 11, and defendants' commodity tax returns as filed with the Japanese Ministry of Finance. The prices of sets exported to the United States were derived primarily from documents produced in discovery by U.S. purchasers of Japanese-made television receivers. Dr. DePodwin performed this second analysis twice: once using domestic prices taken from defendants' answers to interrogatories, and again using

[32] Defendants do not challenge the Cohen report except as utilized by DePodwin. See note 4, *supra*.

domestic prices derived from the Japanese commodity tax returns. He states that the analysis was made with respect to products manufactured by six defendants, but only discusses the results reached for three of them—Sanyo, Toshiba, and MEI. According to DePodwin, the second analysis revealed large disparities between domestic and export prices of these three defendants. As in the first analysis, domestic prices exceeded export prices, in DePodwin's submission, by amounts ranging upward to more than 100% of the export price.

The third analysis is based on the first, but includes adjustments to the prices which are specified in the text of the Antidumping Act of 1916, upon which one count of plaintiffs' complaint was premised. While Dr. DePodwin, in his explanation of the third comparison, discusses the model-by-model comparisons prepared by Walter Lukas, another of plaintiffs' experts, for plaintiff NUE, the third comparison as submitted in his report is not based on those comparisons. Instead, it is based on the figures for average prices by screen size calculated by Morris R. Cohen & Co. which had also been the basis for the first price analysis. According to Dr. DePodwin, making these adjustments "accentuates and increases substantially the dumping margins, already evident in the price differences shown in the preceding portions of this report." DePodwin Report at VI-47.

The defendants' attack on the admissibility of the first and third of these price comparisons is based on the claimed unreliability of the average prices, by screen-size categories, which were calculated by Morris R. Cohen & Co. and used by DePodwin in both those analyses. The Cohen calculations and DePodwin analyses do not even purport to take into account any characteristics of the defendants' television receivers other than screen size and monochrome or color status, thus ignoring both technical differences among models of receivers sold domestically or exported and other differences such as cabinet size and style. Instead, the average price calculations lump together all monochrome and all color receivers of a particular

screen size, even though one model might contain the finest state-of-the-art electronics in an expensive wooden cabinet while another might contain less expensive electronic parts housed in the cheapest of plastic. Most of the defendants have consistently contended that, at pertinent times, their product mix in the United States was predominantly composed of "economy" models, while their product mix in Japan was more heavily weighted toward more expensive models.[53] Dr. DePodwin has made no effort to rebut this contention, nor to make the appropriate allowances for it if it is true.

We think that defendants' objection to DePodwin's use of average prices by screen size is well taken, and accordingly we find his first and third sets of price comparisons inadmissible under both F.R.E. 703 and 702. Under Rule 703, we do not believe an expert economist can reasonably rely upon average prices calculated in such gross terms.[54] Nor, we add, can average prices which are calculated in such gross terms, taking no account of highly significant variations among models, be helpful to the trier of fact. Consequently the first and third set of price comparisons are not admissible.

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[53] This contention is also supported by the affidavit of Mr. Yamagishi. *See* p. 1359 *infra*. The only defendant that has not made this contention is Sony, which asserts that it sold at "the top of the line" in the United States.

It is also worth noting that the average prices relied upon in DePodwin's first comparison represent, in many or most cases, sales by the manufacturing defendants to their sales subsidiaries. Thus the prices used to compute the averages are, in many cases, intracorporate transfer prices between parent and subsidiary or between subsidiary and subsidiary. The Matsushita defendants urge, in their brief concerning DePodwin's cost construction, *see infra*, that the average export prices used in that construction are deficient because they are based upon intracorporate transfer prices between two MEI subsidiaries. The average prices discussed in that brief are the same as those utilized by DePodwin in his first price comparison. While there may well be some merit to Matsushita's contention, we need not and hence do not reach it, either here or in our discussion of the cost construction.

[54] In terms of the factors set forth at p. 1330, *supra*, there is a problem of trustworthiness and of invalidity of assumptions. Our inadmissibility determination is reinforced when it is noted that actual price data was available to plaintiffs.

The defendants' attacks on the second set of price comparisons, which *are* based on model-by-model comparisons constructed by Zenith's tech[n]ical experts, are premised on the notion that Dr. DePodwin is "comparing apples and oranges" in two respects. First, defendants note that we have ruled that television receivers manufactured for use in Japan, as a group, and those manufactured for use in the United States, as a group, are not comparable for purposes of the Antidumping Act of 1916 since they are not of "like grade and quality" and are not commercially interchangeable. Opinion and Order (1916 Antidumping Act), *supra*. More importantly, the defendants contend that Dr. DePodwin's second analysis is based upon a comparison of list prices as opposed to actual prices, charged at different levels of distribution, without regard to rebates or other adjustments, rendering the prices incomparable. They also challenge DePodwin's use of commodity tax returns in his alternative calculation.

As to the first objection, we do not think that Dr. DePodwin's use of price comparisons of models which are not of "like grade and quality" renders his analysis inadmissible. The comparisons which he uses are based on extensive technical studies undertaken by Zenith personnel in order to pair models of television receivers sold in the U.S. and Japanese markets which, in Zenith's submission, are technically comparable. Although we have ruled that the technical differences between television receivers manufactured for use in Japan, as a class, preclude the plaintiffs from comparing the prices of such receivers to support a claim under the Antidumping Act of 1916, different considerations apply to the comparison of television models for purposes of plaintiffs' remaining claims under the Sherman Act.

The issue of comparability under the 1916 Antidumping Act was whether the television models are sufficiently similar to justify subjecting the defendants to treble-damage liability simply because they allegedly charged different prices in the two markets, assuming that the other requirements of the Act are satisfied. The issue of comparability under the Sherman

Act as presented here, on the other hand, is whether the television models are sufficiently similar that proof of allegedly parallel price differentials between the U.S. and Japanese markets is admissible evidence to support an inference of conspiracy from consciously parallel interdependent conduct. Since the Antidumping Act claims as they related to television receivers have been dismissed, the analysis of price comparisons contained in the DePodwin Report is now offered only to support an inference of conspiracy under the Sherman Act. For this purpose, we think it reasonable for Dr. DePodwin to rely upon the Zenith technical model comparisons, even though the models are not of "like grade and quality." The essential test is whether the models are sufficiently similar to make the comparison of their prices logically probative of parallel pricing by the defendants, which is in turn an intermediate step in the inference of conspiracy which plaintiffs seek to have the trier of fact draw from circumstantial evidence. We do not agree with the defendants that the price comparison is logically probative of parallel pricing only if the articles compared are of like grade and quality. Thus, defendants' objection that the models compared are not of like grade and quality does not prevent the price comparisons from being admissible under rule 703.

The defendants' objection to DePodwin's use of price comparisons which employed prices for the domestic Japanese market that were derived from defendant's answers to interrogatories 45 and 46(c) can be analytically broken down into two sub-objections. First, defendants argue that their interrogatory answers provided only list (as opposed to actual) prices and explicitly gave the plaintiffs notice that there were rebate structures involved which were not included in the 45 and 46(c) interrogatory answers. The use of list prices, without allowing for rebates, tends to overstate the domestic Japanese prices and, in defendant's submission, renders Dr. DePodwin's analysis of the price differentials inadmissible under Rule 703. We agree with the defendants on this point. It is plain from the record that rebates were common at all levels of distribution in

the Japanese market. As a result, price comparisons which are based solely on list prices do not provide a trustworthy picture of the economic realities of the Japanese market. Accordingly, such price comparisons are not a reasonable basis for an economic expert's opinion under Rule 703.

The second prong of defendant's objection relates to prices charged at different levels of distribution. They claim that the domestic prices which Dr. DePodwin derived from their answers to interrogatories are suggested retail prices and are identified as such in the interrogatory answers. Dr. DePodwin, they contend, has made no adjustments to the prices to reflect retailers' margin, wholesalers' margin, rebates, or the 15% Japanese commodity tax. The export prices with which Dr. DePodwin compares these unadjusted domestic suggested retail prices, defendants submit, are actual transactional prices paid by large U.S. importers of their products. Defendants' counsel contended at our evidentiary hearing that if the proper adjustments were applied to the domestic prices which Dr. DePodwin used, the differentials which he found would essentially disappear. PTO 281 at 163-64 (July 16, 1980).

The record is insufficient for us to rule at this juncture on this aspect of defendants' objection, for the record as to price levels utilized is undeveloped. Defense counsel represented at the evidentiary hearing that those price comparisons were based on suggested retail prices, *see* PTO 281 at 163, but no supporting affidavit or other evidence was submitted. The plaintiffs have never responded on this point, either at the hearing or in a written submission. The fundamental inadequacy of the record with respect to the calculation of price differentials based upon the interrogatory answers arises from the fact that the differentials themselves were calculated by Zenith personnel using the Zenith computer system; Dr. DePodwin only undertook a statistical analysis of Zenith's results. There is nothing in the record to indicate the methodology used in preparing the computerized price comparisons. Our independent examination of the Toshiba and Matsushita interrogatory answers neither supports nor undermines the representations of de-

fense counsel: both sets of answers provide list prices at several levels of distribution, only one of which is suggested retail price. It is impossible to tell merely from examination of the answers which of the several alternative list prices at different levels provided therein were used by the plaintiffs in constructing the price comparisons which were provided to Dr. DePodwin. Thus, we are unable to rule at this time on this alternative defendants' objection.[55]

The defendants also object to DePodwin's alternative calculation based upon domestic prices derived from the defendants' Japanese commodity tax returns. They suggest that, once again, the domestic and export prices which DePodwin compares are prices at different levels of distribution, hence incomparable.[56]

According to the opinion of the Japanese law firm of Braun, Moriya, Hoashi and Kubota, one of plaintiffs' experts that is at present unchallenged (*see* note 4 *supra*), the assessment standard upon which the Japanese commodity tax is levied can be calculated in two primary ways: one proceeding forward from

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[55] We note, that, in view of the fact that it is the plaintiffs' burden to establish the admissibility of the testimony they proffer once an objection is made, it is highly dubious whether the analysis based on 45 and 46(c) interrogatory answers will be admissible unless the record is supplemented. The preclusivity of the FPS would not necessarily bar supplementation of the record on an evidentiary point. Such supplementation would depend upon whether or not the additional matter were fairly within the framework of what is required by PTO 154 to be set forth in the FPS or expert report and whether, if it should have been set forth, good cause has been shown for failure to do so. If DePodwin's testimony is in fact based on a comparison of prices at different levels of distribution, it is not admissible evidence. The comparison of retail prices with wholesale prices cannot be of any economic or legal significance in the circumstances of this case, and thus plaintiff's economic expert could not reasonably have relied upon such a comparison. Thus, Dr. DePodwin's analysis of price differentials based upon the 45 and 46(c) interrogatory answers may well be inadmissible under Rule 703.

[56] The most thorough coverages of this objection are found in Melco's September 22, 1980 response brief at 114-17 and certain defendants' October 24, 1980 response brief at 30-32.

the ex-factory price, and the second calculating backward from the retail price. The first alternative, based on the ex-factory price, results in an assessment base equal to the "sales price . . . at which the manufacturer offers such commodities at such ex-factory point freely for sale to purchasers in the ordinary amount and form of a wholesale transaction after deducting the commodity tax thereon." Braun, Moriya Report at 2, citing Article II, ¶ 1, item 2 of the Commodity Tax Law of Japan. The second alternative, based on the retail price, is calculated by multiplying the retail price by a fixed percentage, set forth in an appendix to the law. That percentage is apparently intended to represent the amount that would result if the retail price were reduced by "the amount equivalent to the usual profit and expense of the seller of such commodity (excluding the manufacturer thereof) in respect of the sale thereof, together with the amount equivalent to the transportation cost usually paid by the manufacturer," Braun, Moriya Report at 3, and by the commodity tax amount itself.

The Braun, Moriya Report further states at ¶ 5 that the "assessment standard of the commodity tax for television receivers has been mainly based on the retail price thereof . . ." What this means is that the simpler calculation, based on an industry-wide formula, is generally used for television receivers. The assessement standard that results is thus a hypothetical price. The commodity tax formula does not purport to be a reliable guide to the actual prices charged in the Japanese market, but is instead intended as an industry-wide construct which avoids the computation of actual prices for countless transactions.[58] Such artificial prices are simply not comparable

[57] The fact that the Treasury Department at one time utilized this formula in calculating 1921 Act antidumping duties does not help plaintiffs, for as we have already noted, the formula has been effectively repudiated by responsible officials. *See* Public Records Opinion, 505 F.Supp. 1125, at 1157-1158. We explained at that time that Commerce Department General Counsel Homer E. Moyer, Jr. had stated that the formula had been adopted because it was "quick and simple," but "less accurate than original data that document actual foreign market prices." Moyer additionally pointed out that it would be unlikely that a showing could be made that the prices derived from the formula are identical to actual prices in Japan.

to the actual transactional prices in the U.S. market with which DePodwin attempts to compare them. The calculation is accordingly inadmissible under F.R.E. 703.

2. *Appendix B Cost Construction*

Appendix B to Part VI of the DePodwin Report is a mathematical construction which is offered to show that between 1967 and 1970 four companies—MEI, Melco, Hitachi, and Sanyo—sold television receivers in the United States at prices below their costs, while earning substantial profits on their sales in Japan. The construction is explicitly based on three assumptions which are contradicted by the sworn affidavit of Kenji Yamagishi, an MEI executive, and which are also inherently implausible. A fourth assumption implicit in the analysis is also contradicted by Yamagishi's affidavit. The analysis uses average prices by screen size categories which, as we have already ruled, could not reasonably be relied upon by an economics expert. For these reasons, discussed in detail below, the cost construction is inadmissible under Rule 703.[59]

The Appendix B analysis is not based on direct evidence of the defendants' costs. Rather, it is a mathematical construction based only on the internal profit and loss statements of the

[59] The Matsushita defendants also note, supported by Yamagishi's averment, that two of the five Matsushita factories discussed by DePodwin—Moriguchi and Utsunomiya—did not produce television receivers for export to the United States during the relevant period. In his August 1980 affidavit, Dr. DePodwin conceded that his inclusion of the Utsunomiya plant was based on an apparent misreading of MEI's interrogatory answers. In his post-argument affidavit, DePodwin conceded that the Moriguchi production records show that it produced television receivers only for the domestic market. MEI's counsel points out that DePodwin's Appendix B construction found that the Moriguchi and Utsunomiya plant incurred massive losses on exports to the U.S., while in fact the plants produced no exports at all, and characterizes the construction as a "fantasy." Dr. DePodwin's concessions vitiate his analysis as respects the Moriguchi and Utsunomiya plants, but do not in themselves undermine his analysis as respects other Matsushita plants and the plants of other defendants. The concessions are relevant, however, to DePodwin's attack on Yamagishi's credibility. *See* n.62, *infra*.

defendants' factories and on company-wide average prices, or "unit values," of television receivers by screen size, calculated separately for monochrome and color sets, again by Morris J. Cohen & Co.[39] Plaintiffs have submitted this construction in

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[39] DePodwin explains his methodology as follows:

Based on the above assumptions, the methodology for deriving the operating profits on United States exports and domestic sales is illustrated through an example for 12 inch black & white television sold in 1969 by Matsushita's Moriguchi TV Business Division.[6]

[6] The unit values shown are for total company sales of 12 inch black & white television receivers. However, based on assumption (1), these unit values are applicable to the 12 inch black & white television receivers of the Moriguchi TV Business Division.

The following items of data are necessary for the computation:

a. Operating unit profit on sales:	8.8%
b. Unit value, domestic sales:	$76.78
c. Unit value, exports to the United States:	43.65
d. Unit value, exports to the United States and domestic sales:	59.95

Computational Steps:

1. Based on assumption 2(a), the operating profit on exports to the United States plus domestic sales for 12 inch black & white television receivers is 8.8%, i.e., the return on sales of the entire operating unit. Since the unit value (average sales per unit) of these television receivers is $59.95, their average oprating profit per unit is:

8.8% of $59.95 = $5.28

2. Their average operating cost per unit is average sales per unit less average operating profit per unit, or

$59.95 - $5.28 = $54.67

3. Based on the assumption 2(b), the average operating cost per unit is the same for exports to the United States as for domestic sales. Thus,

Average operating cost per unit of exports to the United States = $54.67

Average operating cost per unit of domestic sales = $54.67

4. The average operating profit per unit of domestic sales is the average sales per unit (unit value) of domestic sales less the average operating cost per unit of domestic sales, or

$76.78 - $54.67 = $22.11

Similarly, the average operating profit per unit of exports to the United States is the average sales per unit (unit value) of exports to the United States less the average operating cost per unit of exports to the United States, or

$43.65 - $54.67 = -$11.02, or a loss

lieu of an analysis of the actual cost data of defendants, much of which was tendered to them during discovery, and even more of which plainly would have been discoverable under the Federal Rules of Civil Procedure had they sought it. The extent of the cost data which was actually tendered to plaintiffs' counsel was summarized by Matsushita's counsel during argument:

> MR. MILLSTEIN: [I]n May and June and October of 1976 apparently I'm told that the plaintiff's representatives went to Japan and MEI representatives tendered to the plaintiff for inspection a host of cost-related documents. Just prior to this argument I asked my colleagues to attempt to ascertain what was tendered to the plaintiffs, what did MEI offer to the plaintiffs to look at and what did they look at? And here is the list with which I have been provided.
>
> THE COURT: Are you reading a list of what was tendered or what they looked at?
>
> MR. MILLSTEIN: Tendered and looked at. That's what my colleagues tell me happened in 1976. Expense ledgers, production records, tooling charge calculation sheets, cash journals, accrued expense ledgers, annual financial statements, asset and liability ledgers, sales slips, financial statements for the export color TV department, head office accounts books, accounts payable notes, deposit account books, balance sheets, profit and loss statements, sales and general administrative expense

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5. The operating profit on domestic sales is the average operating profit per unit of domestic sales expressed as a percent of average sales per unit (unit value) of domestic sales, or

$22.11 as a percent of $76.78 = 28.8%

Similarly, the operating loss on exports to the United States is the average operating loss per unit of export to the United States expressed as a percent of average sales per unit (unit value) of exports to the United States, or

$11.02 as a percent of $43.73 = -25.3% Owing to the low unit values for exports to the United States *vis a vis* domestic unit values, the overall operating profit on sales of 8.8 percent for 12 inch black and white television receivers translates to a loss of 25.3 percent on exports to the United States, and a profit of 28.8 percent on domestic sales.

DePodwin Report at VI 72 and 73.

sheets, general allocation and direct sales expense sheets, journal books, specifications of tooling charge calculations, work time and estimated cost calculations for models TR-901BR, TR143AK, TR622UK, TR929UW, general vouchers, materials purchase slips and four more pages which I will not read into the record of those types of papers turned over for the plaintiffs to look at.

> Now, I am told that the plaintiffs took about 25 percent of what they looked at and never touched the balance of 75 percent.

PTO 167 at 633-34 (April 25, 1979). Plaintiffs did not counter Mr. Millstein's representations, sub silentio conceding them.

Although the principal basis for our exclusion of the Appendix B cost construction is its reliance on average prices and erroneous assumptions, it is also significant that the plaintiffs and their expert eschewed the particularized, actual cost data which was available to them, in favor of a mathematical construction in gross terms of what is obviously at best a rough estimate of defendants' costs. The availabiltity of actual cost data is pertinent to our analysis, for we do not think that Dr. DePodwin acted reasonably under Rule 703, in relying on the data and the methodology of Appendix B, when actual cost data was available. As we have stated, however, the principal reasons for the exclusion of Appendix B is its use of average prices by screen-size categories and its reliance on assumptions which, according to the uncontroverted affidavit of a person with knowledge, are simply wrong.[60] We have discussed the infirmity of DePodwin's use of average prices calculated by gross screen size categories *supra* and need not add to that discussion here, incorporating it instead by reference. We turn instead to an analysis of DePodwin's assumptions.

[60] The Matsushita defendants also contend that the DePodwin cost construction is inadmissible or irrelevant because it relies on intracorporate transfer prices between two Matsushita subsidiaries, which in their contention are of no legal or economic significance. *See* n. 53, *supra*. They further contend that the only costs which are relevant to a claim of predatory pricing are marginal or average variable costs, which DePodwin does not even purport to consider. We do not reach these objections.

Dr. DePodwin identifies three assumptions upon which the construction is based:

> The operating profits on exports to the United States and domestic sales are derived for television receivers of several screen sizes, both color as well as black and white, for each company, by operating unit. The derivation is based on the following assumptions:
>
> 1. For each company, the unit values (by screen size, monochrome, and color) of exports to the United States, domestic sales, and exports to the United States plus domestic sales were the same for all television manufacturing plants of the same company.
>
> 2. For each operating unit:
>
> a) The operating profits/losses on all major products covered by the profits/losses reported were in close correspondence.
>
> b) The average (operating) cost of exports to the United States of each screen size, monochrome, and color was the same as the average (operating) cost of domestic sales of the same screen size, monochrome, and color.

DePodwin Report at VI-70 & 71 (footnote omitted). In addition to these explicit assumptions, the defendants have correctly identified a fourth assumption which is made implicitly in the course of the analysis: that the factories considered in the analysis did not produce significant numbers of television receivers destined for sale in countries other than the United States and Japan. We discuss the most egregious of these assumptions first.

a. *The Cost Equivalency Assumption*

The most extravagant assumption in Dr. DePodwin's construction is the one which he identifies in the portion of his report which we have just quoted as 2(b): that within each operating unit, for each monochrome and color screen size, the average operating cost of exports to the United States was the same as the average operating cost of products sold in Japan. We agree with the Matsushita defendants that:

> This "cost equivalency" assumption is the very linchpin of the analysis, since it is used by DePodwin as a surrogate for actually measuring defendants' operating costs for television exports to the United States. Moreover, since the Cohen Report calculates lower unit values (average selling prices) for defendants' U.S. exports vis-a-vis domestic sales, DePodwin's "cost equivalency" assumption essentially preordains the conclusion that defendants' exports will be found to generate lower profits (or, more likely, losses).

In other words, assumption 2(b) is where Dr. DePodwin puts the rabbit into the hat.

According to the affidavit of Kenji Yamagishi, an MEI executive, this assumption is "completely inaccurate." Yamagishi avers:

> During the 1967-70 period, MEI's average operating costs were never the same for sales of television models in domestic and export markets. Rather, in each year discussed by DePodwin, there were substantially different cost factors associated with MEI's production and sale of television sets for these markets which render DePodwin's assumption of a domestic-export "cost equivalency" totally invalid.
>
> Moreover, the mix of television sets sold by MEI in the United States during the 1967-70 period consisted primarily of lower cost economy models, while the mix of television models sold by MEI in Japan during this period was more heavily weighted towards higher cost models. Consequently, average operating costs were consistently lower for exports to the United States than they were for domestic sales.

Thus Yamagishi's affidavit squarely contradicts Dr. DePodwin's cost equivalency assumption.

Dr. DePodwin attempts to support his cost equivalency assumption by an analysis of MEI's production costs, as reported to the United States Treasury Department in connection with the proceeding under the Antidumping Act of 1921. *See generally* Public Records Opinion, 505 F.Supp. 1125, at 1151-1155 (description of antidumping proceedings). According to Dr. DePodwin "the production costs of almost two-thirds of the export models are within 15 percent of the production costs of their equivalent domestic models." DePodwin Report at VI-71. His own figures show, however, that the difference between domestic and export production costs exceeds 10% for 56.7% of the models considered, exceeds 15% for 36.7% of the models considered, and exceeds 20% for 25.0% of the models considered. It is plain that in some cases the domestic production costs are greater than export production costs, while in many other cases the opposite relationship exists. These results hardly support his thesis that export and domestic production costs are identical.[61]

DePodwin also announces that the *average* production cost difference was only 0.02%. We find this figure unpersuasive. First, it is obviously the result of averaging a large number of comparisons in which the domestic costs exceeded the export costs with a similarly large number of comparisons in which the export costs exceeded the domestic costs. It therefore does little to establish that the production costs were nearly identical; the result of averaging a large positive figure with an equal negative figure is always zero. Second, DePodwin does not explain how he calculated his "average"—e.g., whether he gave each comparison equal weight, whether he gave each comparison weight according to the number of units produced of each model, whether he gave each comparison weight according to the monetary value of sales of each model, or whether he gave the comparisons varying weights according to some other system.

In any event, even if the data supported Dr. DePodwin's claims about *production* costs, the equivalency of domestic and

[61] In his August 1980 reply affidavit, DePodwin undertook another, somewhat more extensive analysis of production cost data submitted by MEI to the U.S. Treasury Department. In that analysis, he found that the difference between domestic and export production costs exceeded 10% in only 38.5% of the comparisons considered. We do not find the difference between this analysis of production costs and the one in his original report to be significant in any way.

export production costs would not support his assumption about the equivalency of average *operating* costs. Production costs represent only part of overall operating costs. In his affidavit, Yamagishi avers:

> The "production costs" reported by MEI in the Treasury Department submissions cited by DePodwin [citations omitted] only include manufacturing costs, such as direct material costs, direct labor costs and manufacturing overhead. By contrast, the factor profit and loss statements used by DePodwin to calculate MEI's operating costs included *both* production costs and other operating costs, such as direct selling expenses in Japan, allocation expenses and the Japanese Commodity Tax.

This averment is entirely consistent with the contention of the defendants throughout this litigation, and throughout the 1921 Act antidumping proceeding, that the manufacturing defendants bear substantial expenses for selling, distribution, advertising, promotion, and warranty costs of their products in the domestic Japanese market, as well as the Japanese commodity tax, which they do not bear with respect to models manufactured for export. Because of the difference between operating and production costs, DePodwin's figures for production cost will not support his assumption of the equivalency of average operating costs for domestic and export products.

The failure of the cost equivalency assumption is itself sufficient to vitiate the entire cost construction and render it inadmissible under Rule 703. Since DePodwin also makes three other assumptions which are contradicted by the record, however, we turn to a brief discussion of these.

b. *The Unit Value Equivalency Assumption*

The assumption which Dr. DePodwin identifies as number 1, quoted at 104, *supra*, is that within each screen size, and monochrome or color category, the unit values or average prices of the television receivers made by a particular company were the same in each factory operated by that company. This assumption is made with respect to the average prices of

receivers manufactured for export, of those manufactured for domestic sales, and to the combined average of export and domestic sales. Yamagishi's affidavit flatly contradicts this assumption, averring:

> This is completely inaccurate. In 1972, MEI produced to plaintiff National Union Electric Corporation the production records (MJ4645-4725) for each of the factories studied by the DePodwin Report for the 1967-70 period. These records clearly show that during this period, MEI's factories devoted a diffferent proportion of their production to different priced products in the same screen size and color categories. As a result, the average selling prices (or what DePodwin terms "unit values") were not the same for each of the relevant factories during the 1967-70 period.

In his August 1980 reply affidavit, DePodwin defends this assumption in three ways. First, he asserts that his assumption was not actually that the unit values are *identical*, but only that the unit values are "sufficiently similar" that it is "not unreasonable" to use them in the computation. Of course, DePodwin's own statement of his assumption, quoted *supra* at 1359, belies this assertion. Furthermore, his methodology makes it clear that his assumption is in fact one of identity. *See* n. 59, *supra* (DePodwin's footnote 6). If DePodwin had made a showing that the differences among unit values were so insignificant that they could reasonably be disregarded, that might suffice to justify his assumption of their identity. However, he has made no such showing; nor do the conclusory statements in his report even suffice to put the point in issue.

Second, DePodwin attacks Yamagishi's credibility and claims that there is no evidence to support Yamagishi's averments. His attack on Yamagishi's credibility is based primarily on a factual claim which DePodwin has since withdrawn. It is obvious that Yamagishi's affidavit is itself evidence, and need not be supported by other evidence. Moreover, we find Yamagishi's affidavit highly credible, both because of his high position in MEI, which supports his claim of personal knowledge of the matters covered in his affidavit, and because of the obvious

inherent implausibility of DePodwin's assumptions.[62] It is DePodwin's assumption, and not Yamagishi's averment, that fails for total lack of support in the record.

Finally, DePodwin notes that if he had not made the unit value equivalency assumption, he would have been unable to conduct his analysis on a factory-by-factory basis, but would have been reduced to treating each company as a whole. This contention fails for two reasons. First, the analysis might have been made on the basis of adequate cost data had such been inspected or sought. Second, the fact that his assumption number 1 enabled DePodwin to present his construction with a veneer of precision has no bearing on whether or not the assumption is defensible.

c. *The Operating Profit Equivalency Assumption*

The assumption which Dr. DePodwin identifies as 2(a) (p. 1359, *supra*) is that within each operating unit, the operating profits or losses on all major products were "in close correspondence." Although he does not state the assumption as one of identity among the profits or losses for the various products, using the phrase "in close correspondence," it is clear from his explanation of his methodology that his actual assumption is that the profits or losses for the various products were identical. *See* n.59, *supra* (Computational Step 1). Thus Dr. DePodwin assumes that if a particular factory reports an overall profit rate of 8.8%, it is earning an 8.8% profit on each of the

[62] DePodwin's attack on Yamagishi's credibility in his August 1980 affida-vit is based primarily on DePodwin's claim that the Moriguchi plant produced television receivers for export to the United States. As we have mentioned, Yamagishi averred that the Moriguchi plant manufactured only domestic products. Since DePodwin conceded in his September 22, 1980, affidavit that according to production data Moriguchi produced only for domestic consump-tion, he has in effect withdrawn the basis for his attack on Yamagishi's credibility. *See* n. 58, *supra*. While it is of course true that matters of credibility must at the summary judgment stage be resolved in favor of plaintiffs, that is not the case when the court is assessing admissibility pursuant to F.R.E. 104(a).

products which it manufactures. Again, this assumption is flatly contradicted by Yamagishi:

> During the 1967-70 period, MEI's factories realized different rates of profitability on each of their different television models. There was thus a wide variation between the overall rates of profitability reported for the TV Departments discussed by DePodwin and the individual profitability rates realized for the various television models produced by those factories during the 1967-70 period.

In his August 1980 reply affidavit, DePodwin attempts to justify this assumption by examining the ratio of price to production cost for 89 MEI television models exported to the U.S. and 18 domestic models. His calculations show that the ratio for export models ranges from some unspecified figure below 1.25 to a maximum of 1.54. His calculations for domestic models show a variation from 1.80 to 2.50. Although DePodwin presents only a summary of the distribution of these figures, it appears that with respect to both domestic and export models, the ratios are distributed quite evenly between the extremes we have mentioned. DePodwin claims that these figures demonstrate that the profit or loss rates on various products were "in close correspondence," but this is plainly not so. Apart from the wide variation in DePodwin's ratios themselves, the distinction between production and operating cost vitiates this analysis as well. If, for example, overhead and other non-production costs for export models amount to 25% of production costs, DePodwin's ratios would correspond to a rate of profit which would vary from a loss, in an amount which cannot be discerned from his figures, to a profit of 23%.[63] Thus the

[63] According to DePodwin's figures, the ratio of price to production costs for export models varies from less than 1.25 to a maximum of 1.54. If we assume that non-production costs amount to 25% of production costs, any price below 125% of production costs would represent a loss. The maximum ratio reported by DePodwin, 1.54, would represent a profit of 29% of production costs (154% minus 125%), which is equivalent to 23% of overall costs (29% as a percentage of 125%). While there is no support in the record for our assumption that non-production costs are 25% of production costs, or for any other specific figure, we make the assumption here only for purposes of illustration, *i.e.* to show how DePodwin's analysis is vitiated by his failure to take non-production costs into account.

analysis in DePodwin's reply affidavit is insufficient to support his profit/loss equivalency assumption.

d. *The Assumption That No Products were Manufactured for Export to Third Countries*

An assumption which is implicit in Dr. DePodwin's methodology is that all the television receivers manufactured in the factories which he considers were either sold in Japan or exported to the United States. Yamagishi avers that MEI factories "produced significant numbers of television sets for sale to export markets other than the United States."

According to Dr. DePodwin's August 1980 reply affidavit, Matsushita's sales to third countries amounted to 3.8 percent of its television sales in 1968, 4.2 percent in 1969, and 9.9 percent in 1970. In that affidavit, he recalculates the cost construction to take those third-country sales into account, and avers that the new calculations do not alter his ultimate conclusion that the defendants sold their products at a loss in the United States. However, his own comparison shows that the exclusion of third-country sales resulted in an overstatement of the alleged constructed loss on exports to the U.S. by amounts of up to 10%. Accordingly, it is plain that the exclusion of third-country sales distorted his original calculations to an appreciable extent.

e. *Admissibility With Respect to MEI, Sanyo, Hitachi, and Melco*

We conclude that the Apppendix B cost construction is inadmissible under F.R.E. 703 because of the use of average prices by screen size, because of the erroneous assumptions upon which Dr. DePodwin relied, primarily the assumption of cost equivalency, and because of the availability of more reliable data. The discussion above has focused on MEI because the issues were briefed and argued by MEI's counsel, because only MEI has represented that it actually tendered voluminous cost data to the plaintiffs, because the Yamagishi affidavit refers only to MEI and, balancing out these matters, because

DePodwin made no effort whatever to support any of his assumptions except with respect to MEI.

We think, however, that the Appendix B cost construction is inadmissible with respect to Sanyo, Hitachi, and Melco as well. Although we do not know whether these companies tendered cost data to the plaintiffs, it is plain that such data would have been discoverable under the Federal discovery rules. The construction relies on average prices by screen size in regard to these companies as well as MEI. Furthermore, we have characterized Dr. DePodwin's assumptions as inherently implausible, and all of the defendants have represented that their costs for television receivers manufactured for the domestic market include substantial non-production costs which they do not bear with respect to the television receivers manufactured for export to the United States. In the absence of any support for DePodwin's crucial assumption of cost equivalency, we find that it was unreasonable for him to rely on that assumption in his analysis of any of the four companies which he considered. Nor have DePodwin or the plaintiffs provided adequate support for the other assumptions made with respect to Sanyo, Hitachi, and Melco.[64]

Thus, with respect to all four of the defendants whom DePodwin considers in Appendix B, we find that the cost costruction is pervaded by reliance on untrustworthy sources of information: false or unsupported assumptions, and average prices calculated in gross terms. This pervasive reliance on suspect sources renders the Appendix B cost construction inadmissible in its entirety under Rule 703.

F. *The Japanese Market Background*

Chapter VII of the DePodwin report describes the Japanese domestic market, reaching the conclusion expressed in the

[64] According to DePodwin's figures, Hitachi and Melco did not manufacture television receivers of the same screen size at different plants. Thus DePodwin's assumption number 1—that average prices by screen size were the same at each plant of the same company—is unobjectionable with respect to those two companies.

chapter's title: "The Nature of the Market for Television Receivers in Japan Has Been Conducive to Cartel Agreements." DePodwin discusses the high degree of concentration in the Japanese consumer electronics market, informing us that a high degree of concentration "is conducive to collusion." He goes on to state that "[c]ollusion among domestic manufacturers was aided by barriers to competition from imports." DePodwin Report at VII-1.

After discussing concentration of the market, DePodwin describes other barriers to imports into the Japanese market, concentrating on tariff rates, import quotas, and other governmentally imposed restrictions, such as import deposits, labeling laws, and safety standards. He closes with a short section describing barriers to direct foreign investment in Japan.

We held *supra* that narrative information in the nature of industry background is helpful and admissible under Article VII. Market background is of a similar nature, and is admissible for the same reasons.[65]

One section, however, from pp. VII-7 to VII-12, cannot truly be called background material. That section, which deals specifically with the home electric appliance industry, and which refers specifically to certain of the defendants in this litigation, is based solely on a publication by Komiya *et al.*, which DePodwin quotes verbatim and which he plainly adopts unquestioningly. We discuss a similar section of the Yamamura report based on the same publication *infra* at p. 1368, concluding it is inadmissible. The same result follows here for the same reasons, and we incorporate that discussion here by reference.

[65] Defendants object to this background as irrelevant, contending that trade barriers in Japan have nothing whatever to do with an export conspiracy. That issue will be addressed in our forthcoming opinion on the conspiracy questions.

G. *Summary of Conclusions*

We have not addressed those portions of DePodwin's report which go to the issues of damage and injury, for they are not germane to our decision on the summary judgment motions. Of the remainder of the report, we have found that, with certain exceptions, those matters which are primarily background, *i.e.*, methodology and economic principles in Part I, industry background in Parts II and III, and market structure background in Part VII, are admissible under Article VII. Those portions of the report that discuss the "cartel" alleged to exist in this litigation, primarily Parts IV, V, and VI, are not admissible.[66]

IV. *The Yamamura Report*

A. *Introduction*

If the DePodwin report is the most professionally disinterested of plaintiffs' expert reports, Professor Kozo Yamamura's report, "The Pervasive Use of Collusive and Company Group *(Keiretsu)* Activities in Achieving the Rapid Increase in Japanese Exports of Television Receivers to the United States," is the most partisan.[67] Professor Yamamura, an economist specializing in the Japanese economy, described his task as follows:

> The central purpose of this Report is to demonstrate that the rapid increase in exports of Japanese electronic products for home entertainment (especially television sets and radios) to the United States from the mid-1950s to

[66] Certain calculations of price differentials in Part V were reserved. *See* p. 1348, *supra*.

[67] Professor Yamamura holds a Ph.D. in economics from Northwestern University. He is a Professor of Economics and Asian Studies at the University of Washington, as well as Adjunct Professor of International Business in the School of Business Administration and Chairman of the Japanese Studies Program in the School of International Studies, both at the University of Washington. His publication list is extensive, covering virtually all aspects of Japanese economic history and development.

> the early 1970s was achieved with the substantive and crucial aid of effective collusive activities in which the major Japanese producers of television sets and other electronic products engaged in both domestic and American markets.

Yamamura Report at 1. In contrast to Dr. DePodwin, who sought to examine "whether" collusive behavior among the Japanese was responsible for their success in the United States market, Prof. Yamamura set out to prove "that" collusion was prevalent. We do not say that this is necessarily an impermissible objective, but it does cause us to carefully consider defendants' contention that an expert who begins with the assumption that something is the case is likely to be able to "prove" that the assumption is indeed true.[68]

B. *The Japanese Market Background*

After a brief introduction, the Yamamura report begins with a discussion of the Japanese post-war economy, with emphasis on the importance attached to rapid growth. Part I of the report, entitled "Environment for Rapid Growth of the Economy and Exports," describes two aspects of what Prof. Yamamura describes as close cooperation between industry and government: monetary policy and relaxation and weak enforcement of Japanese antitrust policy. As described by Prof. Yamamura in his summary submitted at the court's request, *see* note 2, *supra:*

> The five critical ingredients of the monetary policy are outlined (on pp. 7-9) and the report states that "the eagerness of the officials of the Ministry of Finance and the Bank of Japan to use their legal and extra-legal powers of persuasion, backed by their powers to allocate loans, the money market was effectively "administered" for the purpose of achieving rapid economic growth" (p. 9). The policy consistently and strongly favored the largest banks and the largest firms, and, in particular, made it difficult for small- and medium-sized firms to obtain loans.

[68] Prof. Yamamura notes that he has long held the views expressed in his report.

> The relaxation and weak enforcement of the domestic antitrust policy also created an environment in which large firms could flourish and cooperate in cartels. Antimonopoly legislation was viewed by industry leaders and pro-growth policymakers as inhibiting economic growth and an increase in exports and a number of important changes were instituted in the 1950s. . . . Not only did the number of exempted cartels increase, but "unauthorized illegal cartels also proliferated, the costs of which included restricted competition at home and the imposition of severe injury to foreign firms in markets abroad." (p. 15). . . . In the words of the report, "Prevailing MITI attitudes and ineffective FTC enforcement have combined to permit widespread violation of Japanese antitrust law." (p. 21). . . . "Cartel capitalism" has had numerous deleterious effects on the Japanese population, including maintaining artificially high domestic prices. Pages 25-32 of the report decument [sic] the increased public criticism and consumer reaction to cartels.

Professor Yamamura follows his general discussion of the Japanese economic environment with a detailed section describing company or industry groups called *keiretsu*, a significant characteristic of Japanese economic life.[69] According to the report, *keiretsu* "collectively dominate the industrial, financial and marketing activities of the [postwar Japanese] economy." As explained by Professor Yamamura at p. 33,

> The central purposes of this section are to: (1) identify the *keiretsu;* (2) present observations and evidence concerning their presidents' clubs, mutual shareholdings, and several other crucial factors which establish their existence and indicate the degrees of their "group solidarity"; (3) discuss the roles of the trading companies as members of company groups; (4) ask why such *keiretsu* exist in Japan; and (5) examine the roles of the *keiretsu* in the effectiveness of domestic cartels and their effect on the conduct of member firms in international markets.

[69] Professor Yamamura concentrates in this section upon company group, or horizontal, *keiretsu*. He touches briefly in a subsequent section upon vertical, or distribution, *keiretsus*, these vertical arrangements are the subject of Professor Haley's report, addressed *infra*.

Professor Yamamura explained in his summary that there are two principal international consequences of *keiretsu:* "(1) they facilitate predatory behavior of firms, and (2) they prevent foreign entry into Japanese markets."

Having described *keiretsu* and their economic effects in detail, Professor Yamamura was able, by way of summary, to conclude the section with a definition:

> A *keiretsu* is a group of companies in various industries which is formed to gain and increase the member companies' collective market power in both domestic and international markets. A *keiretsu* increases the market power of its members because the member companies, as a group, can create a dominant inner circle of the largest companies which effectively limit or minimize the rigor of domestic and international market forces. This inner circle is created because the member companies enjoy a more ready and reliable access to capital, market information, privileged and often exclusive trading relationships, and other advantages than do non-members. To realize these gains, the cohesiveness of the groups is essential and it is solidified by means of the president's clubs, interlocking directorships, cross-shareholdings, and other means.
>
> To the extent that such groups constitute a large segment of the Japanese economy as a whole, and to the extent that the group activities are conducive to increasing the efficiency of the economy by means of shared information, technological expertise and the joint financing of large and riskier ventures, the growth of the Japanese economies are aided by these inner circles—albeit at the cost of having anti-competitive inner circles of large enterprises. For foreign enterprises, however,the *keiretsu* constitute a substantive barrier to trade and an effective source of market power in the Japanese market which increases the efficacy of domestic cartels organized to maximize domestic profits which can be and are used to subsidize the efforts of Japanese cartel members to increase market shares in foreign nations by means of dumping and price fixing.

Yamamura Report at 71-72.

Defendants contest the relevancy of the information provided in these two sections on several grounds,[70] but we do not reach those objections in this opinion. Their Article VII objections are considerably less strenuously pressed. Their 702 argument essentially attacks the relevancy of this discussion: defendants seem to be saying that testimony which is irrelevant is not helpful to the jury. While that may be true, it is more appropriately considered in the relevancy context. We shall restrict our inquiry of helpfulness under F.R.E. 702 to the question whether the expert's specialized knowledge is of assistance to the jury *if* relevant. We hold that these sections of Professor Yamamura's report, which constitute the kind of helpful background we have referred to *supra*, do present significant matters within the purview of an economist otherwise beyond the ken of the jury and pass muster under the "or otherwise" clause of F.R.E. 702.

With respect to F.R.E. 703, defendants challenge occasional individual sentences as being conclusory, without underlying basis. This argument is not vigorously pressed, however, and the contentions have not been explicitly outlined. Nor have the sources upon which Yamamura relies been attacked. We think it is clear from a reading of these sections that the information presented is sufficiently based upon reliable economic sources. We see no problem under F.R.E. 703.[71] Accordingly, Professor

[70] They argue, *inter alia*, that a climate or environment conducive to concerted action is in no way probative of actual concerted action among these defendants. They argue further that an opinion that the Japanese have a "propensity to conspire" is inadmissible character evidence under 404(a), in that it can only logically be offered to suggest that these defendants acted in conformity with that trait. Finally, they argue that, even if some minimal probative value were to be discovered, it is vastly oveshadowed by the unfair prejudice such testimony could engender, and hence is inadmissible under F.R.E. 403 as well.

[71] We should point out that Professor Yamamura's report is fraught with conclusory and inflammatory rhetoric. As we discussed *supra*, we shall have no difficulty ignoring such rhetoric in our consideration of the summary judgment motions. Nor do we foresee any danger at trial, for the requisite form of questioning and availability of the motion to strike will preclude any expert witness from testifying in an inappropriate manner.

Yamamura's "Japanese Market Background" segment will be considered on the summary judgment motion and in connection with the F.R.E. 104(a) conspiracy determination and, subject to an appropriate limiting instruction, may be submitted to the trier of fact at trial.

C. *Collusive Activities*

The remainder of the Yamamura report, beginning at page 73, is totally inadmissible for the same reasons discussed with respect to Dr. DePodwin's report. Professor Yamamura, like Dr. DePodwin, read the documents that have been offered in this case and undertook to weave a story from them, narrating their contents and offering his interpretation. He thus runs afoul of both Rules 703 and 702 by relying on the same untrustworthy documents as did Dr. DePodwin, and by providing no "economic value added" which would assist the trier of fact in understanding the evidence.

Professor Yamamura signals in the introduction to Part III that these problems will undoubtedly arise:

> The central aim of this section is to provide, against the background already presented, the abundant and compelling evidence demonstrating the effectiveness of the collusive activities (vertical and horizontal price fixing, predatory dumping, and other illegal conduct) in which the defendant television producers engaged for over two decades, beginning in the mid-1950s, in both the Japanese domestic market and the United States market.
>
> More specifically, the evidence to be presented below will show: (1) that the collusive activities in which the defendant television producers engaged in the domestic Japanese market were elaborately and closely coordinated and monitored by numerous consultative bodies which met regularly, and by various sub-groups and committees organized within the trade association of the industry for the purpose of fixing prices, profits and rebate rates, market shares, joint output, etc.; and (2) that the collusive activities in which the defendant television producers engaged in the United States market were also elaborately and effectively coordinated, monitored, and implemented—including predatory price fixing and other anti-competitive means intended to increase the Japanese producers' market share in the United States—at the cost of grave and permanent injury to the United States producers of television sets.

Yamamura Report at 73.

Directing his attention first to the domestic market, Professor Yamamura begins with a description of the "collusive activities" of the familiar domestic "conspiratorial groups"—the EIAJ, the Market Stabilization Council, and the various sub rosa groups—followed by page after page (approximately forty of them) of what Yamamura terms "supporting evidence." This "supporting evidence" is nothing but direct quotations from documents submitted in conjunction with this litigation.[72] All of the documents quoted by Professor Yamamura were part of the record in the Six Company Case before the JFTC, and all were considered by us in the pretrial evidentiary hearings. Specifically, he quotes protocols, or statements, by various employees of the six companies,[73] testimony by two of those same employees, and the diaries of Yajima, Yamamoto, and Tokizane. The diaries were excluded from evidence in our Japanese Materials Evidentiary Opinion. The testimony, however, we ruled to be admissible, with the exception of certain export references not at issue here, against the six companies involved; the protocols, with the exception of that of Mr. Koishi

[72] Professor Yamamura's format is somewhat curious. He begins with a four-page conclusory section about collusive meetings, which he follows with a "summary of selected evidence." This "summary" merely lists the paragraph numbers of the "evidence" which follows which supports the statements in the brief narrative. He follows this summary with his "evidence" in a section which merely quotes directly from documents. There is no narrative interspersed, and no attempt at explanation of the documents. The quotations are merely strung one after the other in no immediately apparent order.

[73] Protocols included are those of Adachi (Hitachi), Yamamoto (Hitachi), Kawahara (Toshiba), Kamuro (Toshiba), Kamakura (Toshiba), Saeki (Hayakawa, now Sharp), Narita (Toshiba), Okuma (Melco), Ito (Melco), Koishi (Fuji), and Yajima (Toshiba).

of Fuji, a non-party, we found also to be admissible as admissions against the individual employer.

We need not determine whether Professor Yamamura's use of the admissible protocols and testimony is so tainted by his equal reliance upon the unreliable diaries as to amount to a lack of reasonable reliance under F.R.E. 703, however, for Professor Yamamura has run afoul of F.R.E. 702 by engaging in the same oath-helping conspiracyologist exercise as did Dr. DePodwin. In fact, Yamamura's presentation is even less helpful than DePodwin's, for he has done nothing but quote the documents directly, after prefacing those quotations with a summary of their contents. But under our system of jurisprudence, we leave to lay jurors the task of sifting through the evidence presented, assessing its probative worth, and aided by the arguments of counsel, the instructions provided by the court, and their own common sense, deciding for themselves the inferences and conclusions to be drawn. We do not delegate that task to expert witnesses. This is fact-finding, not the application of expertise, and is totally inappropriate expert testimony.

Concluding his discussion of the Japanese domestic market, Professor Yamamura notes, as described in his summary:

> Of special importance in terms of collusive activities of the defendant television producers in their domestic markets is the control they exercised over distribution, through employing collusive vertical restraints (Section A-3, pp. 118-125). Instrumental in this respect was (1) "tight grip which each major Japanese manufacturer had on their respective distribution outlets" (the details of which are explained on pp. 118-124), which "constituted a very effective barrier to the entry of foreign sellers, Japanese discount stores, and Japanese as well as foreign producers into the Japanese market for television sets and other electric home entertainment products" (p. 124), (2) weak domestic antitrust enforcement (p. 125), and (3) cooperation between MITI and industry (pp. 125-126).

With regard to the first of these points, manufacturers' control over the distribution channels, Professor Yamamura

rather astonishingly quotes verbatim for five and one-half single spaced pages from a publication which he neglects to identify, except by noting that it was written by "Komiya et al." We assume this is the same publication as that cited in a subsequent section at p. 126 and listed in the bibliography for the report. If so, it is a Japanese language article in a Japanese journal, apparently about the electric home appliance industry, with an unknown translator. The quotation discusses the vertical, or distribution, *keiretsu* in the home electric appliance industry, with specific factual reference to some of the defendants in this litigation.

This segment presents an admissibility problem different from the others we have addressed in this opinion. We can assume, although we may be incorrect, that the journal in question is an economics journal, and that Komiya et al. are economists. We can even assume that the article is of the highest scholarly caliber, and that it would be unquestionably reasonable for an expert witness to rely upon it in forming an opinion. But Professor Yamamura has not merely relied upon it in forming an opinion: he has imported it wholesale, incorporating it into his "dissertation" on the Japanese market structure. He has, in actuality, switched expert witnesses. Instead of Professor Yamamura expounding under the "or otherwise" clause of F.R.E. 702, we now have Komiya et al. providing their views. But those persons have not been qualified as expert witnesses in this proceeding. Nor has there been any attempt to qualify the Komiya publication under Rule 803(18), which permits materials "established as . . . reliable authority" and relied upon by an expert witness to be read into evidence as an exception to the hearsay rule. Indeed it would be extremely difficult to so qualify this article, for it presents such detail with respect to individual defendants as to demand a particularly firm foundation. Moreover, the publication is intrinsically tentative on factual matters and does not appear to espouse an opinion. It is replete with phrases such as "it is said that," "there are some manufacturers who," "it is esti-

mated that," and "from a clue provided. . . ." For these reasons, the quoted section is inadmissible.[74]

The other points referred to above—barriers to foreign sellers, weak domestic antitrust enforcement, and cooperation between MITI and industry—are passed over briefly by Professor Yamamura in a page and a half. Essentially, what he has done is to recall earlier sections of the report dealing with market structure, relating them to the television industry. We discussed this technique with reference to the DePodwin report, ruling that such testimony could be admissible only if the underlying factual basis were present in the record. *See* pp. 1346-1347, *supra*. As with the DePodwin report, because we have ruled Prof. Yamamura's discussion of conspiratorial activities inadmissible, there is nothing to inform his application of background materials to his analysis of collusive activities, hence this segment is inadmissible to support Yamamura's conclusions with respect thereto.

Turning from the domestic market to the export market, the report, again as described in the summary,

> explains the collusive activites engaged in by the defendant companies to increase exports of television receivers to the United States market. As is stated in the report, "The elaborate, effective, and nearly two-decade long collusive activities of the defendants in the Japanese domestic market provided them with (1) large profits . . . which were used to finance the expansion of their productive capacities and to absorb the cost of dumping their products in the U.S. market; and (2) an established, on-going, and effective collusive apparatus which was well-tested in the dumping of radios in the United States and was also readily used in the dumping of television receivers in the U.S. market." (p. 126)

Once again the Yamamura report echoes the DePodwin report as it sifts through familiar documents, drawing therefrom conclusions regarding the JMEA rules and manufacturers' agreements, customer registration, the Five-Company Rule, reference prices, kickbacks, and rebates. Yamamura relies for his information primarily upon the Manufacturers' Agreements and JMEA rules, which we have assumed *supra* to be reliable bases for expert testimony in terms of F.R.E. 703. He also, however, quotes heavily from such dubious documents as: the Komiya publication discussed above; a publication cited as Kazuki Daimon, *Kuroi Bukka* (Black Prices), a translation of which, titled "The Fangs of Monopoly," he has attached as Appendix B; *Yomiuri Shimbun*, Japan's major daily newspaper; the Initial decision in the Six Company Case; and the Yajima diaries.

[74] As noted *supra*, the same reasoning excludes a corresponding section of the DePodwin report.

We need not balance Professor Yamamura's reliance on materials of questionable reliability against his use of materials assumed to be reliable, however, for we can easily dispose of this section of the Yamamura Report on F.R.E. 702 grounds. Yamamura has done nothing more than what Dr. DePodwin did. He has provided factual conclusions of conspiratorial activities based upon narration taken directly from documents proffered in this litigation. He has not performed any economic analysis; instead he has engaged in the practice of "conspiracyology." This section of his report is accordingly inadmissible.

Part IV of Prof. Yamamura's report is a brief conclusion which highlights the principal findings. To the extent that the section summarizes materials, such as those dealing with the structure of the market, which we have found admissible under Article VII, the summary is of course admissible as well. To the extent, however, that conclusions are repeated from those portions of the report which we have deemed inadmissible—*i.e.*, the findings of conspiratorial behavior among these defendants—the summary is likewise plainly inadmissible.

To summarize, we have found pages six through seventy-two of Professor Yamamura's report, purged of its conclusory and inflammatory rhetoric, to be admissible, but the balance must be excluded from evidence for the reasons stated.

V. *The Nehmer Report*

The Nehmer Report,[75] "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," submitted by Economic Consulting Services, Inc., shares the problems of the DePodwin and Yamamura reports. As will be seen, the opinions it expresses are inadmissible essentially to the same extent as those reports.

The report proclaims itself an economic analysis, but it is much more akin to a highly-skilled research report prepared for some policy-making body, such as an executive branch agency or congressional committee. As such, it is essentially a collation of the factual materials we have discussed before, with a smattering of economic jargon sprinkled on top, but without the specialized knowledge of the Japanese economy and history provided by Professor Yamamura or the thoroughness of Dr. DePodwin. The report is noteworthy for the paucity of its citations. Nehmer has appended a lengthy bibliography, which includes vast numbers of documents we have held to be inadmissible in our previous evidentiary opinions, but he only occasionally informs the reader which of those many sources he is relying upon for particular information. In actuality Nehmer is plaintiffs' counsel's theoretician. He has supplied the jargon and the theory which has informed plaintiffs' case. As such he has served his purpose, but his opinions do not pass Article VII muster.

[75] Stanley Nehmer holds an M.A. from Columbia University. He is president of Economic Consulting Services, Inc. and Director of Economic Consulting Services, Wolf & Company. He has held a variety of economics-related positions, primarily in government, including Deputy Assistant Secretary for Resources and Trade Assistance, U.S. Department of Commerce, 1965-1973; Deputy Director and then Director, Office of International Resources, U.S. Department of State, 1961-1965; Senior Economist, International Bank for Reconstruction and Development (World Bank), 1957-1961; Economist, Department of State, 1945-1957; Office of Strategic Services (assigned by U.S. Army), 1942-1945; Fellow, City College of New York, 1941-1942; U.S. Representative, Commodities Committee, United Nations Conference on Trade and Development, Geneva (1965); Adjunct Professor, American Business History, American University (1948-1963); Chairman and U.S. Representative, OECD Textiles Committee (1971-1973); Member, Oil Import Appeals Board (1965-1973); Chairman, Committee for the Implementation of Textile Agreements (1972-1973); Alternative Member, Oil Policy Committee (1970-1973); Director, Export Trade Mission to Japan and Hong Kong (1971); and, Director, Export Trade Mission to Eastern Europe (1973).

Mr. Nehmer's publications are primarily historical. In addition, he has frequently testified before the International Trade Commission with regard to various industries.

As with the other reports discussed, we are reminded from the outset that Mr. Nehmer began with a particular goal in mind:

> The basic purpose of the report is to present an economic analysis demonstrating that the Defendants in said litigation ("Defendants") conspired and otherwise engaged in anti-competitive activities contrary to U.S. law in restraint of U.S. trade. The report also addresses the calculation of damages sustained by Zenith as a result of these unlawful acts.
>
> . . . . .
>
> The body of this report is organized in furtherance of four, principal objectives. These objectives can be briefly described, as follows:
>
> (1) demonstrate that the Defendants have conspired to restrain U.S. trade in consumer electronic products and reduce competition in the U.S. market;
>
> (2) demonstrate that the strategy pursued by the Defendants toward this end was anti-competitive in its intent and effects;
>
> (3) demonstrate that the result of Defendants' strategy was the elimination of most U.S. manufacturing of consumer electronic products, and the consequent loss of thousands of U.S. employment opportunities; and
>
> (4) calculate damages sustained by Zenith.

Nehmer Report at I-1 to 2.

Following a brief introduction, the report begins with a chapter entitled "Key Elements of Defendants' Anti-Comptetitive Strategy: Basic Theoretical Concepts." This

chapter is somewhat analogous to DePodwin's "Outline of Economic Analysis," *see* pp. 1336-1337 *supra*, in that it describes a number of basic economic concepts which it then relates in summary fashion to the "evidence" in this case as it is subsequently developed in the report. This chapter is accordingly admissible to the same degree as the correlative DePodwin chapter—that is, to the extent that it explains methodology, economic principles, or analytical framework, it is admissible; to the extent, however, that it applies such principles to the case at bar in conclusory fashion, it is not. Rather, the opinions expressed must be considered in their subsequent factual context.

Chapter III, "Structure of the Japanese Consumer Electronics Industry: A System of Total Control" is analogous in part to sections of the DePodwin and Yamamura reports which we found to be admissible. Nehmer's version, however, we must exclude.

The chapter describes the consumer electronic products industry in Japan "as a system subject to virtually total control by the major manufacturers acting in concert with respect to production, distribution, exports and pricing." Nehmer Report at III-1. The chapter begins with a brief description of the Japanese distribution system of affiliated dealers, and moves quickly into a lengthy discussion of the activities of the Market Stabilization Council. Nehmer briefly describes various of the other industry groups, returns to discourse again on the distribution system, mentions trade barriers,[76] and ends with descriptions of each of the Japanese defendants in this litigation.

Nehmer relies for his description of the industry upon three primary sources: the consent agreement in the Market Stabilization Council case before the JFTC, discussed *supra* at 1340; the Komiya publication discussed *supra* at 1368-1369,

[76] Thus those portions of the chapter addressing the market structure—the distribution system, trade barriers, etc.—are similar to DePodwin's Chapter VII and Yamamura's Chapters 1 and 2.

and a report by Techno International Inc. Nehmer not only relies on the Market Stabilization Council document, he quotes it verbatim for 5½ pages. But as we have discussed, both *supra* and in our Public Records Opinion, that document is not admissible because it is not reliable as proof of the matters set out therein. The Komiya article we discussed extensively in our consideration of the Yamamura report. Although Nehmer does not quote Komiya verbatim, as did Professor Yamamura and Dr. DePodwin, it is plain from his citation style, *see* pp. II-1 to 2; III-17 to 20, that he has merely narrated for a new audience the essence of the Komiya article. Thus the situation is the same as in the Yamamura report: Nehmer has not based an opinion upon a number of sources, but has merely adopted wholesale what someone else has said about the activities of these defendants. The Techno International article is used in precisely the same manner. The only other documents cited in the course of Nehmer's description of the market are: (1) defendants' answers to plaintiffs' interrogatories relating to group membership, which is undisputed; (2) the draft decision in the Six Company Case, cited to support a single paragraph describing the six companies' price agreements but which, as we have already explained, is inadmissible; and (3) a statement by Konosuke Matsushita, discussed *supra*. Reliance on these documents further undermines plaintiffs' position.

For reasons discussed with respect to the DePodwin and Yamamura reports, the opinions expressed in Chapter III of the Nehmer report must be excluded. Nehmer has adopted the sources discussed above, virtually all of which were either ruled inadmissible on trustworthiness grounds, or are otherwise untrustworthy (or not qualified under F.R.E. 803(18) as discussed at 129, *supra*). Opinions based thereupon are accordingly not reasonably based in terms of F.R.E. 703.[77] Moreover,

[77] The closing section of Chapter III, which gives basic background about the individual defendants, is drawn entirely from two sources: *Fortune* magazine, and Judge Higginbotham's opinion on jurisdiction and venue, 402 F.Supp. 262 (E.D.Pa. 1975). The *Fortune* article is plainly inadmissible hearsay. Judge Higginbotham's findings we ruled inadmissible in our Public Records opinion, however we do not reach the F.R.E. 703 issue with regard to reliance upon those findings.

Nehmer has taken these documents and merely described them for his audience, often quoting at length. He has engaged in the same oath-helping factual analysis as have the other experts, hence his narration is inadmissible under F.R.E. 702.

Chapter IV of Nehmer's report, entitled "Japan as a Market 'Closed' to Foreign Competition in the Area of Consumer Electronics," describes the barriers which, in Nehmer's submission, effectively closed the Japanese market to imports. This chapter is similar to Chapter VII of the DePodwin report, discussed *supra* at 1363, and the major portion of it is admissible under Article VII for the same reasons.

The first fourteen pages of the chapter describe the financial and non-financial barriers which allegedly discourage the importation of foreign products into Japan, as well as barriers to direct foreign investment in Japan. While the section is for the most part citationless, we do not see that as a bar to its admissibility as expert testimony, for the bases of the testimony can plainly be elicited at trial under F.R.E. 705. This discussion appears to us to be the type of information which an economist could draw upon his own background and experience to provide, particularly one with as extensive experience in the U.S. Commerce Department as Mr. Nehmer. We have no reason to suspect that Nehmer has primarily relied upon anything other than reliable sources. Moreover, the testimony is helpful in providing background for the trier of fact. Thus, purged of their occasional references to such things as "Defendants' scheme," the first fourteen pages of Chapter IV are appropriate expert testimony.[78]

Beginning on page IV-14, however, Mr. Nehmer takes a different tack, rendering the remainder of the Chapter inadmissible. The section describes unsuccessful efforts by individual U.S. manufacturers to enter the Japanese market, focusing on Zenith, Motorola, and Sears, all parties to this litigation. Nehmer relies solely on documents tendered in this

[78] We intimate no view here on the relevance of the matters contained in this section to the alleged export conspiracy.

case, primarily letters of various company executives.[79] We need not determine the independent admissibility of these documents, nor their reliability for purposes of F.R.E. 703, for the narrative is plainly inadmissible under F.R.E. 702. Nehmer has presented no economic analysis whatsoever, and this is not the type of economics-oriented background information which we found helpful with respect to trade barriers. Instead it is a factual narration with doses of pure speculation tossed in at random,[80] drawn from and quoting liberally documents potentially before the court. Nehmer has merely strung together documents which the jury is perfectly capable of understanding, to describe attempts by American firms to

[79] *Inter alia*, Nehmer cites a letter from I. Kobayashi of C. Itoh & Co., Ltd. of Japan to Y. Tamiya of C. Itoh & Co. (America) Inc., a trading company through which Zenith attempted to sell its products in Japan, purportedly explaining why such marketing efforts must fail; a letter from D. Andre of Nichimen, Inc., another trading company, to J. Miguel, Zenith's Vice President for export, again explaining marketing difficulties; a letter from Charles A. Tausche, a Sears representative, to John Borst, Jr. of Zenith, explaining Sears' exclusion from the Japanese market; a letter from W. Frick of Zenith International to S. Inaba of C. Itoh & Co. (America) terminating Zenith's effort to enter the market; Japanese press reports of Motorola's proposed entry into the market; and a market analysis prepared for Zenith by C. Itoh & Co.

[80] An example of such speculation appears at p. IV-19. In the context of a discussion of Sears' exclusion from the Japanese consumer electronic products market, Nehmer quoted at length from a letter from a representative of the law department at Sears to house counsel for Zenith, written apparently to explain Sears' non-participation in the Japanese market, which included a comment to the effect that exporting such products to Japan was "rather like bringing coals to Newcastle." Nehmer continued:

> The references to coals and Newcastle are hardly appropriate in this context, since if Sears were permitted to sell consumer electronic products in the Japanese market it would make little sense to import these from the United States, given the fact that Sears' principal suppliers were Japanese manufacturers located in Japan. Indeed, it would appear that the true reason for Sears' exclusion from the Japanese market is much more pointed. Sanyo and Toshiba simply would not want their low-priced television receivers produced for delivery to Sears in the U.S. to be sold in the higher-priced Japanese market and thus destroy the price-fixing arrangements of the domestic cartel operating in Japan.

enter the Japanese market. This is the same oath-helping we have held inadmissible before.

Nehmer turns in Chapter V to "Major Features of the Defendants' Anti-Competitive Export Strategy." That chapter outlines the economic structure of defendants' alleged successful penetration of the U.S. CEP market. It is followed by three chapters which detail plaintiffs' conception of the "cartel" with reference to specific product lines: Chapter VI addresses radio receivers; Chapter VII, television receivers, and Chapter VIII, tape recorders, phonographs, and other consumer electronic products. Because of its centrality to Nehmer's exposition, we describe the anatomy of Chapter V in detail before drawing our conclusions.

Chapter V is the most analytic of Nehmer's chapters, explaining in economic terms how and why particular corporate behavior patterns yield particular anti-competitive results. He begins by discussing the alleged system of discriminatory pricing:

> Japanese consumer electronics manufacturers could not export television sets to the United States at the same price at which they were sold in Japan because the cartel maintained artificially high prices in Japan. Japanese products would simply not be marketable in the United States at the high monopoly prices charged in Japan.
>
> But, given a willingness to violate U.S. law, there was no need to charge the same prices in the United States as in Japan. Japan and the United States represented two perfectly segmented markets as far as the Japanese cartel members were concerned: there was a possibility that U.S. buyers could re-export products from the United States to Japan, competition in the Japanese market was restricted, and foreign competition simply was not permitted to exist in Japan.
>
> The ability to charge different prices in the cartelized Japanese market and in the competitive U.S. market also implied that the cartel members could charge a *lower* price in the United States market that would have been possible otherwise, with little consideration for aggregate supply and demand and for the disciplines of cost and capital formation which normally govern a competitive environment.

Nehmer Report at V-1. He then analyzes the effect on the vulnerable U.S. market of the low prices of the Japanese manufacturers, and ends the section with the following summary of his important points:

> 1. Due to the existence of the domestic cartel, cartel members have a capability for discriminatory pricing. This consists of charging artificially high, monopoly prices in Japan and exporting products to the United States at much lower prices.
>
> 2. The prices charged by cartel members in the U.S. market can be set at whatever level is needed to penetrate this market.
>
> 3. The ability to establish a discriminatory pricing scheme stems from the existence of the cartel operating within a Japanese market protected from foreign competition.

Nehmer Report at V-3 & 4.

Turning next to collusion in the export market, Nehmer merely reiterates that:

> [c]ollusion in the export market was an integral part of the operation of the cartel, and analytically it is impossible to divorce a discussion of the Defendants' anti-competitive activities in the U.S. market from their anti-competitive activities in the Japanese market. Such collusion both allowed cartel members to target their sales efforts against U.S. firms rather than each other and provided them with a forum for agreeing upon ways to coordinate and conceal their activities.

Nehmer Report at V-4. He then discusses the Manufacturers', or check-price, Agreements and JMEA rules which we have already described, including a description of the customer registration and allocation procedures, and analyzes their economic basis and effect. The core of plaintiffs' theory as to the check prices is explained thus:

First, "check" prices provided the cartel members with an essential defense against dumping charges. Such check prices could be, and were, presented as transaction prices even when large volumes of products in practice were continually sold at prices that were far below the established check price level, often surreptitiously through the vehicle of secret rebates.

Second, check prices of course served as common reference prices. Such reference prices both provided a convenient point of departure for cartel members in making their pricing decisions and established good lines of communication among the cartel members. Sales at prices above or below these reference prices were made, of course, whenever this was expedient.

Finally, it is important to note that to the extent that the check prices did indeed represent the lowest possible price that could be charged without disrupting the U.S. market and/or without dumping, the frequent and deliberate sales made by the Defendants at prices which were substantially below the established check prices provide clear evidence of anti-competitive intent, as well as large volume of precise examples of illegally concealed dumping margins by individual cartel members.

Nehmer Report at V-6.

Nehmer next spends a few pages describing the Japanese manufacturers' phased entry into the U.S. market, by which they concentrated their sales in a given product category, beginning with those at the bottom end of the price spectrum. He explains that such a strategy increased the impact on the U.S. market by having a more pronounced impact in the targeted category than they would have had a similar sales volume been dispersed throughout the market.

Turning to alternatives to discriminatory pricing, Nehmer informs us that, although the "cartel members apparently preferred to use dumping to penetrate the U.S. market whenever this strategy was possible, . . . this preference did not prevent cartel members from using other methods either to maintain or to increase their share of the U.S. market." These other strategies included development of offshore facilities to take advantage of lower foreign labor costs and a program of anti-competitive acquisitions. The chapter closes with a brief description of the "Historical Evolution of the Japanese Consumer Electronics Cartel." Nehmer then summarizes the "evidence indicating that the Defendants both formed an effective cartel and used a systematic anticompetitive strategy to penetrate the U.S. market":

1. Clear indications of collusion in the Japanese domestic market including: price-fixing agreements, controls on production levels, refusal to allow imports from the U.S., and attempts to prevent entry of new firms into the market.

2. Price discrimination, or the charging of lower prices for exports to the United States than for shipments to the domestic Japanese market, for a *wide range of products over a large number of years.*

3. Massive over-investment, as the cartel members developed production capacity for most consumer electronic products far in excess of that needed to supply the domestic market alone.

4. The establishment of check prices that served both as reference prices and to conceal the dumping activities of the cartel members. These check prices were violated when this served the purposes of the cartel members, often by means of secret rebates paid to U.S. customers.

5. Written restrictions that limited the ability of cartel members to acquire or change customers without the approval of other cartel members, and which limited the ability of two or more cartel members to sell to the same U.S. customer.

6. The acquisition of U.S. firms by cartel members for the apparent purpose of (1) eliminating independent competitors and (2) increasing the market share and consequent market power of the cartel members.

Nehmer Report at V-13.

We have quoted at some length from the Nehmer report in part to illustrate his methodology and style. The entire chapter

is without citation,[81] and its is therefore unclear precisely what information Nehmer is using. At best, he is in essence doing what Dr. DePodwin did in his Outline of Economic Analysis, *supra*, *i.e.*, summarizing the "evidence" discovered in his review of the case (presented in Chapters VI-VIII) and using that information as a basis for analysis. At all events, what Mr. Nehmer has done in Chapter V is to act as plaintiffs' theoretician—or summation orator—drawing conclusions from all the evidence and wrapping it up in a neat package. There is no economist's "value added" and the wrap-up does not bespeak the "ways" of Mr. Nehmer's work. This is the work of a conspiracyologist, not helpful to the trier of fact and inadmissible under Rule 702.

We make a number of additional observations germane to rule 703 analysis. Nehmer has explained many facets of market pricing behavior that could appropriately be the subject of expert testimony. Unfortunately, however, the assumptions from which he extrapolates—that is, the alleged behavior patterns of the defendants which he analyzes—are not supported by the record. We would be inclined to rule that such testimony would be permissible, as an analogy to the hypothetical question, if it were plain there was sufficient evidence in the record to support the assumptions upon which the analysis proceeds.[81a] Indeed, at trial, Mr. Nehmer could join Dr. DePodwin and Professor Yamamura in analyzing economically

[81] It could possibly be argued that an expert's naked, unsupported opinion defeats a summary judgment motion, and that the basis for that opinion need not be revealed until trial under F.R.E. 705, which states:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In this case, however, the court has "require[d] otherwise," for Pretrial Order 154 requires that the bases for expert opinions be included in the parties' preclusive FPS's.

[81a] We note again that plaintiffs were duty bound to have placed it in the record by this time, given the precepts of F.R.Civ.P. 56 and PTO 154.

the evidence presented. However, as the report is presented, the permissible analytical material is so embedded in a context replete with such startling assumptions as defendants' "willingness to violate U.S. law" that it is inseparable from the impermissible conclusions. Moreover, the conclusions that flow from the analysis are so thoroughly intertwined with the conclusory assumptions about defendants' activities that we are totally unable to separate them. The best that can be said for the segment of the report is that it is difficult to discern the basis for Nehmer's opinion in order to determine the reasonableness of his reliance thereupon.

In sum, we find that Chapter V of the Nehmer Report does not comport with the standards outlines under F.R.E. 703 as well as 702. The opinions expressed in Chapter V are therefore inadmissible.

Chapters VI, VII, and VIII describe in detail plaintiffs' (or Nehmer's) conception of the Japanese electronic products cartel. Chapter VI "traces in detail the course of the penetration of the U.S. market for radios by the Japanese consumer electronics industry." Chapter VII does the same for television receivers, and Chapter VIII for tape recorders, phonographs, and other consumer electronic products.

In the radio chapter Nehmer places heavy reliance upon the 1957 consent agreement in the Market Stabilization Council case before the JFTC, the rationales supporting the JMEA rules, the JMEA rules themselves, *Japan Economic Year Book*, JMEA and EIAJ newsletters, *Television Digest*, and the transcript of the record of a case before the Customs Court, *U.S.* v. *Continental Forwarding Co.*, Customs Appeal 5415 (1970). The television chapter relies upon the same 1957 Market Stabilization Council documents, the 1966 Six-Company Case draft decision, the previously-discussed Komiya article, the Manufacturers' Agreements and JMEA rules, various answers to interrogatories, the U.S. Tariff Commission injury determination in the 1921 Act anti-dumping proceeding, and a number of miscellaneous internal memoranda. The tape recor-

der, phonograph, and other products chapter relies almost exclusively upon the JMEA rules and their rationales.

Despite the fact that Chapters VI and VIII present virtually plaintiffs' entire case with respect to non-television products, we content ourselves with this outline, rather than discussing these chapters in any depth, for they are in essential part and flavor indistinguishable from the DePodwin and Yamamura reports. We would prolong this already lengthy opinion unduly if we were to repeat the analysis employed in connection with these reports even though it is equally applicable here. Even positing that some of these materials (*e.g.*, interrogatory answers, the Manufacturers' Agreements and the JMEA Rules) are trustworthy and admissible, the balance of materials on which Nehmer relies tip heavily to the side of untrustworthiness. Many, if not most, of the materails were excluded or are excludable; others are inadmissible or of no significance for reasons discussed from time to time herein. We incorporate by reference what we have said above in connection with the DePodwin and Yamamura reports.

However, even were we to wave a magic wand, declare all of these sources trustworthy, and rule that expert testimony based thereupon meets the requirements of F.R.E. 703, we would still be met by the insurmountable barrier of F.R.E. 702. Nehmer has done in these three chapters exactly what DePodwin and Yamamura did in their reports. He has taken documents otherwise potentially before the court and has analyzed them factually, building the edifice upon which the economic analysis of Chapter V, discussed *supra*, could proceed. He has not in these chapters aided the trier of fact in understanding anything other than factual matters already within its province. He has engaged in precisely the oath-helping the defendants' condemn, telling the trier of fact what defendants have done. His factual analysis is inadmissible under F.R.E. 702.

The balance of the Nehmer Report—Chapters IX and X—addresses injury and damage issues, which we need not reach at this summary judgment stage.

Accordingly, we find the opinions described above expressed in the Nehmer Report inadmissible, with the exception of the portions of Chapter II which deal with methodology and the first fourteen pages of Chapter IV.

VI. *The Saxonhouse Report*

"The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing and Price Behavior," by Gary R. Saxonhouse,[82] is best summarized by Professor Saxonhouse himself:

> This paper shows that Japanese firms, in general, and Japanese electrical equipment manufacturing including radio and television manufacturers, in particular, had higher fixed costs than did their American counterparts. These exceptionally high fixed costs were the result of the special labor market and financing practices common to Japanese firms. These high Japanese fixed costs had three consequences which are pertinent to the present litigation.
>
> First, given their high fixed costs, Japanese radio and television manufacturers had a strong desire to avoid the risks of financially injurious, vigorous price competition. This, in turn created a very strong desire to collude among Japanese manufacturers.
>
> Second, the very high fixed costs meant, in a Japanese institutional context, that Japanese radio and television manufacturers would dump more output abroad with larger differences between home market price and domestic price than would otherwise be the case.
>
> Third, it is shown that collusive price increasing behavior by Japanese manufacturers in their home market enabled and sustained lower prices in Japan's export markets. There is an initimate connection between pricing behavior in Japan's home market and pricing behavior overseas. Higher prices at home subsidized lower prices overseas.

Saxonhouse Report at 1-2.

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[82] Dr. Saxonhouse is a Professor of Economics at the University of Michigan.

Defendants' primary objections to the Saxonhouse report are relevancy-based. They argue, first, that it is simply not a permissible inference to say that high fixed costs imply a wish to avoid risk, which in turn implies a motivation to collude. Second, they argue that, even if the assumptions about Japanese corporations in general were warranted, there is no basis for an inference that these particular defendants had any motivation to collude. And finally, they argue that propensity to collude is impermissible character evidence under F.R.E. 404(a). These are all potentially valid objections which we shall consider in conjunction with the conspiracy opinion. But the report is fundamentally flawed under Article VII as well.

The first portion of Professor Saxonhouse's report reviews statistics comparing (1) the debt-equity ratios of Japanese and American companies, as well as those of Zenith, NUE and various defendants; (2) the rates of corporate bankruptcy in Japan and the United States; (3) the rates of worker separation in the Japanese and American electrical equipment industries; and (4) expenditures for research and development by Japanese and American companies. Based upon these comparisons, he concludes that Japanese companies have higher fixed costs than American companies.

The figures which Saxonhouse uses are not seriously challenged as unreliable. However, we note that they do represent unweighted arithmetic averages, rather than providing information about individual companies. The single table, Appendix Table 4, that does break down the debt equity ratio averages on a company-by-company basis shows that, while for most years the Japanese manufacturing companies had higher debt-equity ratios than the plaintiff companies, that was not consistently the case.[83]

Having concluded that Japanese companies have higher fixed costs than do American companies, Saxonhouse states

[83] Analyzed in the table are MEI, Sanyo, Sharp, Sony, Hitachi, Toshiba, Melco, Zenith, and NUE.

that "[t]his, in itself, makes predictable the necessity for collusive activity to minimize the risks entailed as a result of high fixed obligations." Saxonhouse Report at 5. This highly dubious inference is followed by the breathtaking statement that "[t]he following analysis will proceed *on the premise documented elsewhere that a calculated collusive decision had been made by Japanese radio and television manufacturers to take a continually increasing share of the American market,*" citing the DePowdwin and Yamamura reports. Saxonhouse Report at 5-6 (emphasis added). What Saxonhouse has done is to assume the very proposition which he then proceeds to "prove," and to base that assumption upon opinions which we have since found to be inadmissible, based in part upon their reliance upon untrustworthy information.

The ensuing pages of this brief report (14 pages of text, plus additional tables) are highly speculative, despite being adorned by impressive-appearing graphs charting the relationship between total costs and output and profit-loss curves. The following statement is illustrative:

> Studies of industries in the United States suggest that heavy fixed charges increase the desire and motivation of firms to collude. With fixed charges almost universally higher in Japan, the desire and motivation to collude in the home market and to carry that collusion to export markets must also have been stronger.

Saxonhouse report at 7-8 (footnote omitted).[84]

Not only is the report speculative, but it repeatedly restates the fact that a collusive decision by the defendants has been explicitly assumed. Neither Rule 703, which excludes opinions based upon unreliable assumptions, nor Rule 702, which ex-

[84] Defendants attack the two U.S.-industry studies cited by Saxonhouse, suggesting that studies of U.S. industry imply nothing about Japanese industry, and pointing out that one of those studies is based upon a classroom game rather than actual corporate behavior. When an economist uses scholarly economic literature, however, rather than the types of materials found untrustworthy in this case, we are loath to unnecessarily impugn the bases for his opinion.

cludes opinion testimony not helpful to the trier of fact, condones the admission of such circular expert testimony. The opinions expressed in the Saxonhouse report are inadmissible.

VII. *The Haley Report*

Defendants' primary objection to "Vertical Restraints by Japanese Television Manufacturers: Anticompetitive Effects" by John O. Haley[85] is that it is irrelevant or, if minimally probative, nonetheless excludable under F.R.E. 403. However, they also interpose objections based upon F.R.E. 702 and 703.

As defined in his recently submitted summary, the conclusions reached by Professor Haley are:

1. From 1966 through the mid 1970s the defendant Japanese television manufacturers had the capacity effectively to enforce a price-fixing agreement (or cartel) related to sale of television receivers in Japan as a result of the following factors:

(1) There were governmentally-imposed barriers to entry by foreign television manufacturers under the Foreign Investment Law and the Foreign Exchange and Foreign Trade Control Law.

(2) The Japanese television industry, and in particular such major firms as Matsushita Electric Industrial Co. Ltd., Hitachi Co. Ltd., Sony and Tokyo Shibaura Electric Co. Ltd., had established by 1966 a network of manufacturer-controlled wholesale and retail outlets that permitted manufacturer supervision and control over resale prices.

[85] Professor Haley holds an LL.B. from Yale University and an LL.M. from the University of Washington. He is Associate Professor of Law at the University of Washington, Executive Secretary of the Japanese American Society for Legal Studies, and Managing Editor of *Law in Japan: An Annual*, the principal English-language periodical on Japanese law. He studied in Japan as a Fulbright-Hays Scholar and earlier as a Princeton-in-Asia Teaching Fellow, and held legal clerkships with Japanese law firms from 1971-74. He has published extensively on various facets of Japanese law.

2. The defendant Japanese television manufacturers, particularly major manufacturers such as Sony and Matsushita Electric Industrial Co. Ltd., used their control over distribution to fix and maintain resale prices.

Defendants do not attack Professor Haley's discussion of Japanese barriers to foreign competition beyond arguing that it, like similar discussions in the other reports, is irrelevant. Thus, for Article VII purposes the discussion summarized by subparagraph (1) above, when stripped of its occasional resort to conclusory terminology, is admissible. Similarly, the Japanese defendants do not dispute that they had a large number of affiliated dealers. They argue, however that the conclusion at the end of subparagraph (2), that the practice of using affiliated dealers "permitted manufacturer supervision and control over resale prices" and the related conclusion of paragraph 1 that this control amounted to a "capacity effectively to enforce a price-fixing agreement" are economic conclusions and hence beyond Haley's expertise as a law professor specializing in Japanese antitrust law.

While that suggestion is superficially attractive, we decline to rule on that basis. The line between antitrust law and antitrust economics is of necessity indistinct, and it is not clear to us that these statements are beyond Haley's sphere of expertise, especially since he will be subject to cross-examination. Accordingly, those portions of Haley's report which express the opinion that because of their distribution systems defendants had the capacity to fix resale prices are not excludable under Article VII for the same reasons that Professor Yamamura's discussion regarding motivation to collude is unobjectionable.[86] As an expert on Japanese law, Professor Haley is also capable of explaining that these distribution networks have been subject to increasing concern by the Japanese Fair Trade Commission.

Notwithstanding the foregoing, Haley's leap to the conclusion that Japanese television manufacturers actually used

[86] We express no view at this time with regard to the relevance of such a conclusion.

the capacity which he has posited in support of an actual price-fixing conspiracy (paragraph 2 above) is not admissible.[87] Haley's support for this conclusion apparently stems entirely from JFTC documents in three cases. None of these documents pass trustworthiness muster. He refers to the Initial Decision in the Six-Company Case, discussed *supra*, as showing that a price-fixing agreement among the Japanese manufacturing defendants "required manufacturer-imposed resale price maintenance as a means of effecting the horizontal agreement." Haley Report at 7. As we have already noted, the document was withdrawn by plaintiffs and is in any event untrustworthy. To show resale price maintenance he refers to the Draft of Decision and Consent Decision in the resale price maintenance case against Matsushita, but both of these were excluded in the Public Records Opinion. Haley also cites a Recommendation Decision in a similar case against Sony. While the Sony document was not deemed important enough by plaintiffs to be proffered at the pretrial evidentiary hearings, it would clearly be inadmissible for the same reasons as the Recomendation Decision in the Market Stabilization Council case—because it is a preliminary, advocatory document in the nature of a complaint, which is not probative of the matters asserted. *See* Public Records Opinion, 505 F.Supp. 1125, at 1176-1184. As we explained *supra*, an opinion based pervasively upon such materials cannot be admissible under F.R.E. 703.

Moreover, the conclusion does not follow from those documents. The Six Company Case, which was terminated by the Commission for lack of evidence, alleged a horizontal agreement to fix prices. The resale price maintenance case against

[87] One peculiarity of Haley's report deserves particular mention. In his summary of conclusions, quoted *supra*, he states that defendants "used their control over distribution to fix and maintain resale prices." In the actual report, Haley also suggested that distribution control was a "necessary feature of the 1964 cartel since the horizontal and vertical price-fixing cover could not be effective without such control." Haley Report at 9. If by this he means to suggest that vertical control is a necessary predicate to horizontal price-fixing, he is contradicted by a vast body of antitrust law and practice over the past century.

Matsushita which ended in a consent agreement, while concededly addressing a vertical arrangement, implicates only Matsushita. We observed with respect to F.R.E. 702, at 1134, *supra*, that opinions including inferences which cannot logically be drawn are inadmissible because they are not helpful to the trier of fact. To suggest, as Haley does, that because (under his assumption) the six companies were all involved in a horizontal conspiracy; because Matsushita and Sony were involved in vertical arrangements; and because such vertical arrangements are necessary to effectuate the horizontal agreement *(see* note 87 *supra)* all six companies were therefore guilty of vertical price-fixing is not a drawable inference. We cannot permit such faulty inferences to be presented to the trier of fact, hence the opinion is inadmissible on this alternate ground.

VIII. *Conclusion*

We have found the major, critical opinions presented in plaintiffs' expert reports—those dealing with defendants' alleged conspiratorial activities—to be inadmissible under Article VII of the Federal Rules of Evidence. When we address the issue of conspiracy in our forthcoming summary judgment opinion, we will be left primarily with those portions of the expert reports that can be fairly described as "background" materials. We have also reserved our ruling with respect to certain of the price comparisons presented in Part V of the DePodwin report. We emphasize that we have not said that an economist may never express an opinion on conspiratorial activities of a defendant based upon certain market behaviors. Rather, we have said that the experts in this case have created their assumptions—the market behavior in question—in ways that invade the province of the fact-finder and, moreover, that their assumptions are based almost exclusively upon faulty underlying data. Under those circumstances, the experts opinions are inadmissible.[88]

[88] Minutes before the intended filing of this opinion, we received a letter from plaintiffs' counsel, Edwin P. Rome, Esq., dated December 8, 1980, addressing issues related to the cost constructions presented in Appendix B

Because our rulings are all subsumed within the foregoing opinion, a separate Pretrial Order is unnecessary.

to Part VI of the DePodwin Report, which we ruled upon at pp. 1356-1363, *supra*. We delayed filing our opinion for a day in order to consider this additional correspondence. Upon review, we find that the letter adds no new information which would affect the analysis presented *supra*.

ZENITH RADIO CORPORATION,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

NATIONAL UNION ELECTRIC CORPORATION,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

In re JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

April 14, 1980.

As Amended April 23 and April 25, 1980.

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Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, Kevin R. Keating, Michael S. Press, New York City, Pepper, Hamilton & Scheetz by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., and Sanyo Elec. Trading Co., Ltd., defendants.

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OPINION AND ORDER

(1916 Antidumping Ac)

EDWARD R. BECKER, District Judge.

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I. *Preliminary Statement*

Dumping is a phenomenon in international trade which has been defined as "price discrimination between purchasers in different national markets."[1] Generically, dumping is the sale of commodities in a foreign market at a price which is lower than the price or value of comparable commodities in the country of their origin. The issue before us arises in the context of the alleged dumping in the United States of television receivers, radios, phonographs and tape and cassette recorders man-

[1] J. Viner, Dumping: A Problem in International Trade 4 (1923, reprinted 1966).

ufactured in Japan. Plaintiffs Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE") have alleged in their complaints that the Japanese defendants[2] and their co-conspirators[3] are and have been participants in a conspiracy which, by artificially lowering export prices, has for more than 20 years sought the methodical destruction of the United States domestic consumer electronic products industry. This litigation is described generally at pp. 1195-1198 of our opinion on subject matter jursidiction, filed this day. Instead of rescribing that description here, we simply incorporate those pages by reference. Suffice it here to say that this is one of the most massive cases ever heard by the United States Courts, and that in addition to numerous claims under the antitrust laws, plaintiffs seek treble damages for alleged violations of the Antidumping Act of 1916,[4] one of several dumping statutes enacted by the Congress.

[2] The ten principal defendants are Mitsubishi Corporation, a Japanese trading company; Matsushita Electric Industrial Co., Ltd., Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Mitsubishi Electric Corporation ("MELCO"), Sanyo Electric Co., Ltd., and Sony Corporation, all Japanese manufacturers of consumer electric products; and two American companies, Motorola, Inc. and Sears, Roebuck & Co. Fourteen other defendants are subsidiaries of the principal Japanese defendants. Of the twenty-four defendants, fifteen are defendants in both suits, seven in the Zenith action only, and two in the NUE action only.

[3] In addition to the twenty-four named defendants, the plaintiffs have identified dozens of alleged coconspirators whose business operations span the globe, ranging from small Japanese companies to such world industrial giants as N. V. Phillips Gloeilampenfabrieken and General Electric.

[4] The Antidumping Act of 1916, hereinafter variously "the 1916 Antidumping Act," "the 1916 Act," or, where appropriate, "the Act," is here reproduced in full:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systemically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale

This opinion addresses the separate motions of several groups of defendants for summary judgment on the plaintiffs' 1916 Antidumping Act claims. The motions addressed to the 1916 Act claims have been advanced as part of wider motions seeking summary judgment on other discrete portions of the litigation as well. Motions which deal with the 1916 Act claims have been filed by Mitsubishi Electric Corporation and Melco Sales, Inc.; by Sears, Roebuck and Co.; by Matsushita Electric Industrial Co., Ltd., and affiliated defendants; and by Hitachi, Ltd., Toshiba Corporation, Sanyo Electric Co. and their affili-

price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction on actions for damages thereunder.

15 U.S.C. § 72. The plaintiff's claims under the 1916 Act are stated in Count I of the Complaint of plaintiff NUE, in Count VII of the Complaint of plaintiff Zenith, and in Count VI of Zenith's Counterclaim. NUE's claims involve only television receivers, while Zenith's claims encompass other consumer electronic products as well.

ated defendants.[5] The numerous summary judgment motions concerning this and other issues are catalogued in our opinion on subject matter jurisdiction. As is explained there, we intend to decide the pending motions issue by issue, writing separate opinions on each issue if necessary. Accordingly, this opinion disposes of the arguments based on the 1916 Antidumping Act made in all of the motions listed above, and does not reach the other issues which are comprehended in these motions.

In order to decide the defendants' motions for summary judgment on plaintiffs' dumping claims, we are required to interpret the 1916 Act and to apply it to the undisputed facts before us. Although television sets and other consumer electronic products manufactured for sale and use in the United States, as a class, and consumer electronic products manufactured for sale and use in Japan, as a class, look essentially the same and serve precisely the same functions for the listener or viewer, U.S. and Japanese consumer electronic products[6] are adapted to the technical conventions of television and FM broadcasting and of the electrical power systems which are

[5] The Hitachi-Toshiba-Sanyo motion was joined by Sharp Corporation, Mitsubishi Corporation, and their subsidiaries. Sony Corporation and its subsidiary have moved separately for summary judgment on factual grounds particular to Sony, but have also asserted the legal theory which is addressed in this opinion. Three of the four motions listed in the text are addressed to other matters as well as the 1916 Act claims. Sears Roebuck's motion is concerned only with Zenith's dumping claims as stated in Count VI of the Zenith Counterclaim.

These motions and others raise additional questions concerning the construction of the 1916 Act, apart from the comparability issue which is addressed in this opinion. In particular, a number of arguments have been made concerning the predatory intent proviso of the Act. We do not reach these arguments here.

[6] Throughout this opinion, we refer on occasion to "U.S." products and "Japanese" products, as a shorthand for products manufactured for sale and use in the United States and in Japan, respectively. In deciding the instant motions, we are only concerned with products manufactured in Japan; we are deciding whether products manufactured in Japan for the Japanese domestic

different in the two countries. While the standards for encoding visual and aural information on a radio wave are identical in the television and FM systems of the U.S. and Japan, the frequencies allocated to TV and FM broadcasts are different. As a result, television and FM receivers manufactured for use in Japan cannot receive many broadcasts in the U.S. and vice versa. In addition, the Japanese electrical power system uses 100 volts and frequencies of either 50 or 60 Hertz ("Hz"), while the U.S. system is at 120 volts and only 60 Hz. Because of this difference, Japanese television receivers used in the U.S. would be in serious danger of failing because of overheating, Japanese phonographs and tape recorders of a certain design would run at the wrong speed, and the audio output of radios, phonographs, and tape recorders would include an objectionable hum.

These facts, which are undisputed, form the background for the task before us in this opinion—*i.e.*, the first construction in the 64 years since the enactment of the 1916 Act of its core provisions. More specifically, we must decide what standards the Act imposes for the comparability of the United States and foreign products required in order for an import transaction to be subject to the prohibition of the 1916 Act.

While the contentions of the parties will be set forth in detail *infra*, suffice it to say for purposes of this preliminary statement that the defendants, arguing from the text of the 1916 Act which uses the referent "such articles," contend that goods do not meet the comparability standards of the Act unless they are identical which concededly the goods in question are not. Alternatively, defendants argue that the "like grade and quality" standard of § 2 of the Clayton Act, which preceded the 1916 Act, is applicable, a standard which defendants assert, plain-

home market are comparable with products manufactured in Japan for exportation to the United States. The products made by American manufacturers and their characteristics are not discussed anywhere in this opinion. Consequently, the appellation "U.S.," whenever used in this opinion, refers to the place of intended use of electronic products, and never to their place of manufacture.

tiffs have not met. Plaintiffs, on the other hand, vigorously protest over-literal constructions and assert that television sets manufactured for use in the United States and those manufactured for use in Japan are both television sets serving precisely the same function, and that with the exception of adaptation to the technical conventions of the two countries, they are essentially the same. Just as the defendants contend that the 1916 Act does not apply, the plaintiffs vigorously assert that it does.

The precise question before us is whether TV sets and other consumer electronic products manufactured for sale and use in the United States, as a class, and consumer electronic products manufactured for sale and use in Japan, as a class, are sufficiently similar to be comparable for purposes of the 1916 Act even though: (1) the two classes of products are adapted to the different technical conventions of the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable. As will be seen during the course of our lengthy discussion, we answer this question in the negative, holding that the two classes of products are not comparable under the 1916 Act.

Although the Antidumping Act of 1916 has been in force for nearly 64 years, it has rarely been used and therefore has rarely been construed. In order to resolve the issue before us we find it necessary to examine the legislative history of the Act, and its background in contemporary law and politics, in far greater depth than has heretofore been recorded. Our detailed analysis of the 1916 Act is contained in Part IV of this opinion. We also have occasion to compare the 1916 Act, which creates a private right of action for treble damages and provides criminal penalties for dumping, with the Antidumping Act of 1921 ("the 1921 Act" or "the 1921 Antidumping Act"), which established an administrative system for the assessment of special customs duties for dumping. The 1921 Antidumping Act has very recently been repealed but the system of dumping

duties which it created remains essentially intact in its successor legislation. The 1921 Antidumping Act is involved in this litigation because the plaintiffs seek to introduce into evidence the fact that the Treasury Department, which formerly administered the 1921 Act, has assessed dumping duties against many of the defendants for importing television receivers from Japan at prices lower than those at which comparable models have been sold in Japan. As is set forth more fully in a subsequent part of this opinion, we hold that the administrative findings of dumping under the 1921 Act are not pertinent to the instant claims of privately actionable dumping under the 1916 Act because the 1921 Act and its successor legislation grant the administering authority broad discretion to determine whether products sold in the two countries are comparable, whereas litigants under the 1916 Act are not clothed with the same discretion.

As will be seen, our examination of the legislative history of the 1916 Act reveals that it was intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914. Conforming to the will of Congress, we will hold that the 1916 Act cannot be applied to articles which are not sufficiently similar to be comparable for purposes of domestic price discrimination law. Hence, to give rise to a violation of the 1916 Act, the products sold in the United States and the products sold in the foreign country must be of "like grade and quality" as that phrase is used in § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13. Case law under the Robinson-Patman Act makes it clear that physically different articles are not of "like grade and quality" if the differences affect consumer use and preference or marketability.

Although the 1916 Act was intended as a companion to the antitrust laws, Congress borrowed language from contemporary customs appraisement law to refer to the price of goods in the foreign country. As we shall explain, by using the term "actual market value or wholesale price," Congress incorporated by reference the valuation provisions of the Tariff Act of 1913 ("the 1913 Act" or "the 1913 Tariff Act"). Under that statute, and under both earlier and subsequent practice, the value of imported merchandise could be determined by reference to sales of "similar" merchandise in the country of origin. The standard employed to decide whether merchandise was sufficiently "similar" was strict, however: "similar" merchandise had to be commercially interchangeable with the articles under appraisement. Because of the use of language taken from the 1913 Tariff Act in the 1916 Antidumping Act, we will hold that there is no violation of the 1916 Act unless the standards of similarity of customs appraisement law are met.

Both of the legal standards which we find applicable speak in terms of consumer use, consumer preference, and marketability. The standard derived from customs appraisement law is the more rigorous of the two: it requires commercial interchangeability. While we recognize that that the relevant differences between consumer electronic products manufactured for use in the U.S., as a class, and those manufactured for use in Japan, as a class, are only adaptations to the differing technical conventions of the two countries, their impact on consumer use, consumer preference, and marketability is clear: a product manufactured for sale in one nation is of no practical use to a consumer in the other nation. Consequently, the products do not meet the standards which are applicable to product comparisons under the 1916 Antidumping Act, and summary judgment on the 1916 Act claims must be granted.[7]

The foregoing is a capsule summary of the ultimate conclusions of this opinion. In the course of its development we

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[7] In conjunction with granting summary judgment, we dismiss Count I of NUE's Complaint, which states NUE's claims under the 1916 Act and is limited to television receivers. Zenith's claims under the 1916 Act encompass non-television products as well as television receivers, and, as will appear in due course, a small category of non-television products escapes the effects of our summary judgment order. Accordingly, we do not dismiss the Zenith 1916 Act claims *in toto*.

have many tasks. Our first task is to state the parties' contentions, both legal and factual. Next we will make "findings" of the facts as to which no genuine issue exists. In the next following portion of the opinion, we review the 1916 Antidumping Act in general terms, analyzing its language, its legislative history, and its background in the law and politics of the first administration of Woodrow Wilson. After this review, we address our attention to the particular legal issues raised by the instant motions. In the penultimate part of this opinion, we discuss the standards controlling the grant of summary judgment and demonstrate that summary judgment is required here. Finally, we explain our reasons for certifying our order for immediate interlocutory appeal under 28 U.S.C. § 1292(b).

II. *Contentions Of The Parties*

A. *The Defendants*

The principal argument which defendants have advanced in support of their motions for summary judgment on plaintiffs' dumping claims hinges on the meaning of the word "such."[8] The 1916 Act mandates that the price at which imported articles are sold within the United States be compared with "the actual market value or wholesale price of *such* articles" in a foreign country, after certain expenses are added to the foreign value. 15 U.S.C. § 72 (emphasis added). From this juxtaposition alone, the defendants contend that the 1916 Act contemplates a

[8] Some of the arguments stated in this part of our opinion have been made by all the moving defendants: some arguments have been made only by one defendant or one group of defendants. We make no attempt here to ascribe particular arguments to the particular defendants who made them. We do not consider in this opinion the contention of defendants Sharp Corporation and Sharp Electronics Corporation that any claim under the 1916 Antidumping Act is barred by the 1953 Treaty of Friendship, Commerce and Navigation with Japan, 4 U.S.T. 2063, T.I.A.S. 2863. While that contention is properly before us, the plaintiffs have not had the opportunity to respond to it. We have scheduled argument on the Sharp defendants' contentions based on the 1953 Treaty for June 18, 1980.

comparison of the price of *identical* articles sold in the U.S. and in the relevant foreign market. This simplistic argument is, however, not strongly pressed; rather, the defendants rely upon a line of cases in the customs courts, which interpret the word "such" in a related context.

Unlike the 1916 Act, which uses the lone term "such" in the phrase we have just quoted, many other customs appraisement statutes use the language "such or similar" to specify which articles may be considered by the customs appraiser in his determination of value. In construing the phrase "such or similar," the customs courts have held as follows: (1) the word "such" means identical; (2) when applying an appraisement statute which includes that phrase, an appraiser should look first to sales of identical merchandise, and should only look to sales of similar merchandise if identical merchandise is not sold in the relevant market; and (3) whether or not merchandise is "similar" within the meaning of customs appraisement statutes is to be determined by the application of several criteria, including commercial interchangeability of the putatively "similar" articles. *E.g., United States* v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19 (1928); *United States* v. *Johnson Co.*, 9 Ct.Cust.App. 258 (1919).

Relying on this line of customs decisions, defendants argue that the word "such," standing alone in the context quoted in the 1916 Antidumping Act, should be interpreted to mean "identical." They contend that by using the single word "such" in the 1916 Act, where it might have used the disjunction "such or similar," Congress must have intended to limit the application of the Act to situations in which identical merchandise is sold in the United States and in the relevant foreign market. Accordingly, they argue that the 1916 Act is inapplicable in this litigation unless the consumer electronic products sold in the United States and in Japan are identical.[9]

[9] Some of the defendants have also argued that plaintiffs' 1916 Act claims should be dismissed because U.S. consumer electronic products do not have an "actual market value or wholesale price" in Japan. They rely on *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384, 408-09 (D.Del.1978), in which

To establish the factual predicate for their summary judgment motions, defendants have submitted numerous affidavits and have taken the depositions of several of plaintiffs' expert witnesses. In a subsequent part of this opinion, we state the material facts as to which there is no genuine issue, and there is no reason to duplicate that exposition here. For our present purposes, it is sufficient to note that defendants' affidavits are advanced to show that there are specific physical differences between consumer electronic products manufactured for use in the United States, as a class, and those manufactured for use in Japan, as a class.[10] These differences arise from the different technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, in the two coun-

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Judge Schwartz dismissed a claim under the 1916 Antidumping Act for the alleged dumping of golf carts manufactured in Poland. It was undisputed in *Pezetel* that the defendants' golf carts were not sold in Poland and were not commonly exported to third countries, but were sold only in the U.S. Judge Schwartz ruled that the 1916 Act does not provide a private right of action to challenge activity in a single market, *i.e.*, the United States, and accordingly dismissed the dumping claims.

The defendants in the instant case try to assimilate this litigation to *Pezetel* by arguing that there are no relevant sales in Japan because products made for sale in the U.S. are not sold in Japan. This argument, however, "puts the rabbit in the hat" by assuming that the consumer electronic products which defendants concede *are* sold in Japan are not comparable with those sold in the U.S., either because they are not identical or because they are not sufficiently similar. In *Pezetel*, in contrast, there were *no* sales of golf carts of any type in Poland or in relevant third countries. Because defendants' argument relying on *Pezetel* assumes what is to be proved, *i.e.*, that the standard for comparability of products under the 1916 Act is not met here, we consider it to be merely an alternate verbal formulation of defendants' main arguments on comparability.

[10] While the differences with which we are concerned in this opinion are those between U.S. products, as a class, and Japanese products, as a class, there are also, in some instances, individual differences between the particular products which plaintiffs have sought to pair for their dumping comparisons. Such individual differences are revealed in the model-by-model matchups to which we will refer in our discussion of the factual record. *See* pp. 1202-1203, *infra*. The defendants have not based their arguments on these individual differences; neither however have they conceded that the class-by-class differences are the only pertinent ones.

tries. Since the evidence produced by the defendants tends to show specific differences between U.S. and Japanese products, it tends to demonstrate, *a fortiori*, that in defendants' contention those products are not identical.

The defendants have also advanced several other arguments concerning the comparability of U.S. and Japanese consumer electronic products under the 1916 Antidumping Act. Noting that the 1916 Act had an underlying antitrust purpose, they posit that the Clayton Antitrust Act of 1914, which banned price discrimination but applied only to domestic transactions, exempted from its proscription any price discrimination made "on account of differences in the grade [or] quality" of the articles sold. They submit that because of this language the Clayton Act, like the 1916 Antidumping Act, required physical identity of the products sought to be compared on a charge of domestic price discrimination. They note also that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, which currently governs domestic price discrimination, applies only to sales of commodities which are of "like grade and quality." 15 U.S.C. § 13(a). They accordingly argue that the 1916 Act must be interpreted in light of § 2 of the Clayton Act, and that because of the undisputed physical differences between U.S. and Japanese consumer electronic products, which affect their marketability, they are not of "like grade and quality." The defendants' argument based on the Robinson-Patman Act was originally set forth in no more than two pages of their memoranda supporting their motions, but the argument has assumed increased prominence in their latest submission dated March 7, 1980.

Alternatively, the defendants contend that U.S. and Japanese consumer electronic products are not even "similar," as that term is construed in post-1916 customs appraisement law. As we have noted, the customs courts have held that "similar" articles must be, *inter alia*, commercially interchangeable. Defendants point in particular to two decisions. In *United States* v. *Eggen*, 55 C.C.P.A. 95 (1968), the Court of Customs and Patent Appeals held that ball bearings in metric

sizes were not "similar" to ball bearings in inch sizes, because the two were not commercially interchangeable. In *United States* v. *Ford Motor Company*, 46 Cust.Ct. 735 (1961), the Customs Court held that right-hand-drive automobiles manufactured for use in Ireland were not "similar" to left-hand-drive automobiles manufactured for use in the United States, again because the two types of automobiles were not commercially interchangeable. The argument based on construction of the word "similar" in customs appraisement law was originally set forth in a brief footnote in a Sears Roebuck memorandum, but like the Robinson-Patman argument it has assumed increased prominence in defendants' latest submission.

In response to our request, the parties submitted supplemental memoranda on the legislative, political, and social history of the 1916 Antiduimping Act.[11] In their joint memorandum, the defendants argue that "the 1916 Act was firmly rooted in antitrust principles and was passed by a Congress whose majority was fervently anti-protectionist." They contend that the Act should therefore be construed in harmony with the antitrust laws to foster, and not to inhibit, vigorous price competition in United States markets.

The defendants have also argued that the 1916 Act includes criminal penalties, and was viewed by Congress primarily as a criminal provision. Although the criminal penalties created by the Act are not involved in this civil litigation, defendants point out that whatever construction we give the statute might be applied in future criminal cases, and therefore argue that we should construe the statute strictly against those who seek to invoke its provisions. *See FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). While we do not address this argument specifically in our discussion, we are mindful that the 1916 Act is a criminal as well as a civil statute.

[11] All told, the various defendants submitted a total of 13 briefs which deal, in whole or in part, with issues discussed in this opinion. The plaintiffs submitted 8 briefs. In addition, we heard extensive oral argument on the motions.

The criminal side of the statute does not affect our reasoning, however, for we are convinced that we would interpret the Act as we do in this opinion even if this were a criminal prosecution under the 1916 Antidumping Act.

The defendants have also advanced several arguments concerning the interpretation of the 1916 Act with respect to issues besides the comparability of U.S. and Japanese products. These other arguments concern the interpretation of two other key phrases in the statute: the predatory intent clause, and the language making the statutory prohibition applicable to "any person importing or assisting in importing." *See* n. 4, *supra* (quoting the Act in full). For example, some defendants have argued that in order to show predatory intent, plaintiffs must show that each defendant sold its products at a price below its marginal cost, citing, *e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975), or that the defendant has a sizable share of the market. Some defendants have argued that they have neither imported nor assisted in importing products from Japan to the United States because their sales are made only in Japan. In addition, several defendants have argued that the Act is inapplicable to them because they sell consumer electronic products only in the United States, and the Act should be applied only to companies which themselves sell products in both markets.[11A] With a single

[11A] Sears Roebuck has recently filed a motion arguing that Zenith's dumping claims against it, which were made in Zenith's Counterclaim filed March 17, 1977, are barred by the statute of limitations. Sears, which is not a defendant in the NUE action, contends that the relevant statute of limitations is the Pennsylvania six-year statute, 12 P.S. § 31.

In addition, Motorola contends in a recent motion that the dumping claim against it must be dismissed because Zenith has failed to set forth in the FPS any facts supporting a dumping claim against Motorola. Motorola is not a defendant in the NUE action.

exception, we need not, hence we do not reach any of these arguments.[12]

B. *The Plaintiffs*

The plaintiffs argue that defendants' proposed construction of the 1916 Antidumping Act "is nothing more than an evisceration of the Act and a vehicle for frustrating the clear purposes of Congress." They point out that the customs decisions construing the phrase "such or similar" are all interpretations of other statutes, not of the 1916 Antidumping Act. They argue that the narrow construction of the term "such" in those decisions was necessary there to avoid rendering that word redundant, but is not necessary in the interpretation of the 1916 Act. They argue that a restrictive reading of the Act would be at odds with its remedial purpose, and that Congress intended to broadly proscribe unfair methods of competition in international trade. Noting, as do defendants, that the Act was primarily intended to complement the antitrust laws, plaintiffs contend that private antitrust plaintiffs should be favored and not hindered in their efforts to enforce the antitrust laws, and that this principle should apply equally to plaintiffs seeking damages under the 1916 Antidumping Act. They characterize defendants' reading of the Act as "hypertechnical," and contend that the Act should be read to permit the comparison of

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[12] We reject the contention of defendants Mitsubishi Corporation and Mitsubishi International Corporation that plaintiffs cannot establish predatory intent with respect to defendants whose market share in sales of consumer electronic products in the United States is small. The 1916 Antidumping Act, unlike *e.g.* section 2 of the Sherman Act, does not require plaintiffs to show that any defendant's predatory intent was accompanied by a dangerous probability of success. Thus the plaintiff is entitled to attempt to establish a defendant's predatory intent by inference, even if the defendant's small market share makes it unlikely that it will succeed in injuring American industry. Moreover, plaintiffs claim that all the Japanese defendants and their coconspirators joined a conspiracy which had the requisite predatory intent: if the plaintiffs can produce evidence *aliunde* of the conspiracy and of particular defendants' membership in it, the defendants who joined the conspiracy will be chargeable with its intent.

products in broad, common-sense generic categories. Plaintiffs here focus, needless to say, on the obvious functional similarity between Japanese TV sets and other products, as used by consumers in Japan, and U.S. TV sets and other products, as used by consumers in the U.S.

Plaintiffs also observed that the ordinary meaning of the word "such" is not so narrow as the construction for which defendants contend, and produce many pages of dictionary definitions to support their argument. They next argue that the expression "actual market value or wholesale price of such articles" means the actual market value or wholesale price of the very articles imported into the United States, and that those articles can have an actual market value in Japan even though identical articles are not sold in Japan. This contention is supported by an extensive review of customs appraisement law, including in particular ¶ R of the Tariff Act of 1913, which defined "actual market value or wholesale price" and was in force when the 1916 Antidumping Act was passed. Plaintiffs point out that ¶ R permitted customs appraisers to refer to sales of similar but not identical merchandise to determine the value of goods undergoing appraisement, and argue that the same rule should be applied in the interpretation of the 1916 Antidumping Act. Plaintiffs have not responded to defendants' arguments based on the Robinson-Patman Act and on the post-1916 customs interpretations of the term "similar."

With respect to the facts, plaintiffs admit that most of the specific differences between U.S. and Japanese consumer electronic products which defendants have identified do exist. Plaintiffs' affiant and expert witnesses aver, however, that these differences are insignificant technically and do not substantially affect the cost of manufacturing U.S. and Japanese products. Plaintiffs argue that because the differences are insignificant from a technical or cost standpoint, the differences do not affect the comparability of U.S. and Japanese products.

In their memorandum on the legislative, political, and social history of the 1916 Act, plaintiffs characterize the Act as an

"economic statute" which has both protectionist and antitrust aspects. They argue that the Act was the product of a political compromise between the Democratic majority in Congress, which opposed tariff protectionism, and the Republican minority, which was avowedly protectionist. Any protectionist facet of the statute would, of course, help plaintiffs' cause.

Having completed our review of the parties' contentions, we turn next to an examination of the factual record before us on the motions for summary judgment.

III. *The Factual Record On Summary Judgment*

A. *Introduction*

In deciding the instant motions addressed to plaintiffs' 1916 Act claims, we have consulted all pertinent evidentiary sources.[13] These include the numerous affidavits filed in support of and opposition to the motions, testimony taken in depositons, plaintiffs' expert witness reports on product comparisons, the model-by-model matchups submitted by the plaintiffs, and the relevant portions of the plaintiffs' Final Pretrial Statement. As will be seen, these sources reveal that the facts which are material to the instant motions are not in dispute, although of course the parties disagree vigorously on the significance of the undisputed facts. The facts which we relate in the following pages are, without exception, admitted by the plaintiffs, and there is accordingly not even the slightest doubt as to their veracity. Before relating these facts it is important that we discuss their evidentiary foundation.

The various defendants have submitted the affidavits of six persons to support their motions on the 1916 Act claims: Masami Itoga (Mitsubishi Electric Corp.), Harry E. Ruther, Jr.

[13] We reject the contention of defendant MELCO that the record for summary judgment closed at some date prior to the filing of plaintiffs' Expert Witness Reports and Final Pretrial Statement. *See* discussion in our opinion on subject matter jurisdiction filed this day, 494 F.Supp. 1161, 1168-1170.

(Sears, Roebuck & Co.), Gordon Reichard (Sears, Roebuck & Co.) (two affidavits), Nobuyuki Yamataka (Matsushita Electrical Industrial Co.), M. Yoshida (Sharp Electronics Corp.), and Akio Morita (Sony Corp.) (¶ 64). Defendants have also referred to the deposition testimony of Zenith executives Vito Brugliera and Karl H. Horn.[14]

Plaintiffs' principal affiant with respect to product comparisons under the 1916 Antidumping Act is Vito Brugliera, Manager of Value Engineering for Zenith. He has submitted six affidavits responding to defendants' affiants, and one affidavit in response to our request. Plaintiffs have also submitted the affidavits of George A. Schupp and Rocco F. Mainiero, two other Zenith officials.[15]

Plaintiffs have also submitted two expert witness reports on the technical comparability of consumer electronic products manufactured for the Japanese market with products manufactured for the U.S. market. The report of Walter Lukas on behalf of plaintiff National Union Electric Corporation concerns only television receivers, which are the only products involved in NUE's claim. The report of Karl Horn and Vito Brugliera, on behalf of Zenith addresses the comparability of television receivers, radios, phonographs, and tape recorder/players. Both reports are based on voluminous and detailed

[14] In addition, defendants have referred to the deposition testimony of Walter C. Fisher, a Zenith executive, and to a letter of William G. Frick, Executive Vice President of Zenith International Sales Corp., dated February 7, 1974, produced as Zenith Document Nos. 30519-20. The Fisher testimony and Frick letter are primarily relevant to cost issues which we do not consider. *See* n. 23, *infra*.

[15] Plaintiffs have also referred to statements in Toshiba Document No. TJ 4629 (Zenith Document No. 4863). According to plaintiffs' translation of that document, S. Yajima, a Toshiba employee, wrote "[t]he same thing exported is to be sold domestically." In context, the statement appears to refer to the cabinet for a television receiver. In light of the undisputed physical differences between U.S. and Japanese television receivers, *see* text *infra*, and although we are mindful of our duty to make all inferences favorable to the plaintiffs, we cannot infer from this lone statement that there is a genuine issue of fact as to the specific differences detailed *infra*.

model-by-model matchups, which were made independently by the authors of each report.[16] The reports include exposition of the technological basis for matchups and the method of their construction, and express opinions, based on the matchups, as to the technological comparability of the products sold in the U.S. and in Japan.

The matchups constructed by the plaintiffs' expert witnesses do not take into account the categorical differences between products manufactured for the Japanese market, as a class, and those manufactured for the U.S. market, as a class, which are detailed *infra*. Lukas states explicitly that these differences are "general considerations" which "do not materially impact upon technological comparability." *See* n.22, *infra*. The method of selecting comparable models which Lukas describes in his report makes no allowances for differences in tuners and power supply components to accommodate the differences we describe below. Although the Horn/Brugliera report does not include an explicit disclaimer of the sort made by Lukas, the detailed explanation in that report of the method of their construction of the model-by-model matchups makes it clear that the differences we describe were not factors in their analysis either. Plainly, the model-by-model matchups are based on the assumption that those differences are not *legally* significant. Since the matchups constructed by

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[16] We required plaintiffs to prepare and file these model-by-model matchups during the discovery phase of this case in order to inform the defendants of plaintiffs' contentions concerning their dumping claims and the manner in which plaintiffs intend to prove their dumping case at trial, so that defendants would be able to prepare their defenses. The requirement for specific model-by-model matchups was necessary because there were literally thousands of television models made by the defendants during the relevant time period, and many models of non-television products. As a result there was a virtually limitless number of possible pairings of models upon which plaintiffs might base their dumping claims. We required plaintiffs to select a limited number of home market and export models to pair for comparison. Because of the great technical detail involved in the selection of models for comparison, and more particularly because of the technical differences which were *not* considered by plaintiffs' experts in preparing model-by-model matchups, the matchups shed considerable light on the instant motions.

plaintiffs' experts do not address but do not contravene the differences described herein, the validity of the matchups as essential support for plaintiffs' claims under the 1916 Antidumping Act is wholly dependent on whether or not we agree with the assumption upon which the matchups are based: that the undisputed physical differences between products used in Japan and those used in the U.S. are legally insignificant.

The plaintiffs' Final Pretrial Statement ("FPS") was filed pursuant to Pretrial Order No. 154, a case management order which we entered on March 20, 1979, to govern the final pretrial phases of this gargantuan litigation. Pretrial Order No. 154 has been published as an appendix to our opinion certifying for interlocutory appeal our prior opinion and order concerning plaintiffs' Seventh Amendment right to civil trial by jury, 478 F.Supp. 889, 946-60 (E.D.Pa.1979), *appeal pending*, No. 79-2540 (3d Cir. filed Sept. 20, 1979). The requirements governing the FPS are set forth in Part III of Pretrial Order No. 154, 478 F.Supp. at 949-50. Plaintiffs were required to set forth in narrative form each fact which they intend to prove at trial. *Id.* Part III-C, 478 F.Supp. at 949. The FPS has preclusionary effect: except for good cause shown, the plaintiffs are precluded from offering at trial any facts or evidence to prove such facts which have not been disclosed to the defendants and the court in plaintiffs' FPS. *Id.* Part III-D, 478 F.Supp. at 949-50. The FPS which plaintiffs have filed, including appendices, errata, and addenda, contains more than 17,000 pages.

The plaintiffs' dumping claims as set forth in the FPS, vol. 17 at 8049-8273, are based on massive model-by-model price comparisons which they have submitted with the FPS as Appendices C, D, and J. The price comparisons are based on the matchups of models sold in the U.S. with models sold in Japan which were constructed by plaintiffs' experts Lukas and Horn/Brugliera. FPS vol. 17 at 8052 (television receivers); *id.* at 8151-64 (non-television consumer electronic products). As a result, the validity of the plaintiffs' dumping claims as set forth with preclusive effect in the FPS is dependent on the validity of the model-by-model matchups which were constructed accord-

ing to the methods described in the reports of plaintiffs' expert witnesses. As we have noted, the validity of the matchups depends in turn on whether or not U.S. and Japanese consumer electronic products are comparable for purposes of the 1916 Antidumping Act despite the undisputed differences between them. Except insofar as it reveals plaintiffs' reliance on the model-by-model matchups to support their dumping claims, plaintiffs' FPS does not otherwise address the issues of product comparability which are involved in the instant motions.

We turn now to an exposition of the technical differences between consumer electronic products made for use in Japan and in the U.S., and the effects of those differences on consumer use and marketability of those products. We begin with television receivers, and then consider the same factual matters with respect to non-television products.

B. *Physical Similarities and Differences Between U.S. and Japanese Television Receivers*

Apart from variations between and among particular models of television receivers, which do not concern us here, there are technological differences between television receivers sold for use in the United States, as a class, and television receivers sold for use in Japan, as a class. There are also extensive similarities in the technology employed in the two classes of products. We address the similarities first, and then turn to the differences.

The function of any television receiver is to create sound and pictures by decoding information which has been encoded upon a radio signal of a particular frequency. There are three major systems in use for encoding audio and video information by altering the electrical characteristics of a radio signal:

PAL (Phase Alternating Line);

SECAM (Sequential Color and Memory); and

NTSC (National Television Standards Committee).

PAL is used in Germany; SECAM is used in France and the Soviet Union. NTSC is used in the United States and in Japan, and in many other countries. Because both Japan and the U.S. employ the NTSC standards, the electrical characteristics by which visual and auditory information are encoded on a radio frequency to convey sound and pictures to the consumer's home are identical in the two countries.[17] Because the standards are identical, the signal processing technology within television receivers used in the two countries is the same.

Television receivers designed for use in Japan could be operated in the United States, and receivers designed for use in the United States could be operated in Japan, if the following components were altered or replaced:

1. Very High Frequency (VHF) Tuner
2. Ultra High Frequency (UHF) Tuner
3. Power Transformer.

The functions of these components, and the reasons why identical ones cannot be used in the U.S. and in Japan, are ex-

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[17] The following technical characteristics are common to both the U.S. and the Japanese television systems:

Number of lines	525
Video bandwidth	4 Mhz
Channel width	6 Mhz
Sound carrier relative to picture carrier	+4.5 Mhz
Line frequency	15750 Hz
Field frequency	60 Hz
Picture frequency	30Hz
Picture modulation	AM
Picture modulation sense	Negative
Sound modulation	FM ±25 Khz
Sync waveform	+25%
Interlace	Two-to-one
Picture scan	Left-to-right and Top-to bottom

plained *infra*. Television receivers which are physically identical except for these three components[18] could be operated in both countries.[19]

The material differences between U.S. and Japanese television receivers arise from two sources: the differing frequencies upon which television broadcasts are made, and differences in the available alternating current power supply. The U.S. and Japanese television systems differ in the allocation of radio frequencies for television broadcasts. In Japan, TV broadcasts are made on frequencies ranging from 90 to 108 megahertz ("Mhz") and from 170 to 222 Mhz for VHF broadcasts, and from 470 to 770 Mhz for UHF broadcasts. In the United States, VHF broadcasts are made on frequencies ranging from 54 to 88 Mhz and from 174 to 216 Mhz, and UHF broadcasts are made on frequencies ranging from 470 to 890 Mhz. It should be

[18] The defendants' affiant Gordon A. Reichard avers that a fourth component, the Video Intermediate Frequency System, would have to be altered or replaced. The VHF and UHF tuners in a television receiver convert the broadcast frequencies which they receive to a lower frequency known as the intermediate frequency ("IF") for transmission to the Video Intermediate Frequency System. The IF still has encoded upon it the audio and video information which will eventually be used to produce sound and pictures, after being processed by the Video Intermediate Frequency System and other components of the television receiver. The intermediate frequencies in use in the United States and in Japan are different. In the United States, the IF is 45.75 Mhz for video and 41.25 Mhz for audio; in Japan, the IF is 58.75 Mhz for video and 54.25 Mhz for audio. Although Reichard states that a TV receiver designed for use in one market could not be used in the other market without changes in the Video Intermediate Frequency System, presumably to accommodiate the admitted difference in IF values, plaintiffs' affiant Vito Brugliera avers that physically and electronically identical components of this type could be used in the U.S. and in Japan. There is thus a genuine issue of fact on this point, but the issue is not material since the other differences between U.S. and Japanese products are sufficient for summary judgment under the legal standard formulated in Part V of this opinion.

[19] Although receivers with only these differences would be physically capable of operation in both countries, receivers which are operable in Japan might not be *legally* operable in the United States because of federal standards governing the emission of radiation. *See* 21 C.F.R. Part 1020 (1979).

apparent from these figures alone that, although there is some overlap in both the VHF and the UHF bands, much of the frequency spectrum which is allotted to television broadcasts in each country is not so used in the other country. More importantly, the allocation of specific frequencies to particular television channels differs as between the U.S. and Japan.[20]

The VHF and UHF tuners within a television receiver receive transmitted radio signals of desired frequencies, upon which audio and video information has been encoded. The tuners convert the received signal to specific lower frequencies, *see* n.18, *supra*, and transmit the converted signal to

[20] The following table sets forth the channel frequencies of the VHF band in the United States and Japan.

CHANNEL	*U.S.A.*	*JAPAN*
1 - Picture	None	91.25 Mhz
1 - Sound	None	[illegible]5.75 Mhz
2 - Picture	55.25 Mhz	97.25 Mhz
2 - Sound	59.75 Mhz	101.75 Mhz
3 - Picture	61.25 Mhz	103.25 Mhz
3 - Sound	65.75 Mhz	107.75 Mhz
4 - Picture	67.25 Mhz	171.25 Mhz
4 - Sound	71.75 Mhz	175.75 Mhz
5 - Picture	77.25 Mhz	177.25 Mhz
5 - Sound	81.75 Mhz	181.75 Mhz
6 - Picture	83.25 Mhz	183.25 Mhz
6 - Sound	87.75 Mhz	186.75 Mhz
7 - Picture	175.25 Mhz	189.25 Mhz
7 - Sound	179.75 Mhz	193.75 Mhz
8 - Picture	181.25 Mhz	19 .25 Mhz
8 - Sound	185.75 Mhz	197.75 Mhz
9 - Picture	187.25 Mhz	199.25 Mhz
9 - Sound	191.75 Mhz	203.75 Mhz
10 - Picture	193.25 Mhz	205.25 Mhz
10 - Sound	197.75 Mhz	209.75 Mhz
11 - Picture	199.25 Mhz	211.25 Mhz
11 - Sound	203.75 Mhz	215.75 Mhz
12 - Picture	205.25 Mhz	217.25 Mhz
12 - Sound	209.75 Mhz	221.75 Mhz
13 - Picture	211.25 Mhz	UHF BAND STARTS
13 - Sound	215.75 Mhz	UHF BAND STARTS

other components of the TV receiver for processing. The VHF and UHF tuners employed in the U.S. and in Japan must be physically different to accommodate the different frequencies upon which television picture and sound are broadcast in the two countries.

As a result of the foregoing, Japanese television receivers could not receive most VHF television broadcasts in the United States, and *vice versa*, even if the sets were otherwise operable. The Japanese channels 8, 9, 10, and 11 correspond to the U.S. channels 10, 11, 12, and 13, respectively. A Japanese set operated in the U.S. could receive U.S. channels 10-13 and no others; a U.S. set operated in Japan could receive Japanese channels 8-11 and no others. The Japanese UHF band is wholly included in the U.S. UHF band; a U.S. set operated in Japan could receive all UHF broadcasts, but a Japanese set operated in the U.S. could not receive all U.S. UHF broadcasts.[21]

The U.S. and Japanese systems for the transmission of electrical energy in the form of alternating current also differ. Thus the power sources available for the operation of television receivers and other appliances are not the same in the two countries. In the United States, electric power is supplied at 120 volts, with a power frequency of 60 Hz; in Japan, power is supplied at 100 volts, with frequencies of either 50 Hz or 60 Hz in use in different parts of the country. The power transformers in television receivers convert incoming alternating current to direct current at a voltage appropriate to the electronic design of the receiver. Because television receivers used in the U.S. and in Japan are designed to operate on the available power supply, the power transformers in use in the two countries are different. However, receivers which are powered only by batteries could be used interchangeably in the two countries, if they were altered to receive the appropriate frequencies.

[21] UHF channel allocations of the U.S. and Japan are listed in the 1966 World Radio TV Handbook (20th ed.) at 249 (attached to Report of Walter Lukas).

C. *Effect of the Physical Differences on Consumer Use and Marketability*

The plaintiffs' affiants and expert witnesses emphasize that the physical differences which we have outlined between television receivers sold in the U.S., as a class, and television receivers sold in Japan, as a class, are technically insignificant.[22] In deciding these summary judgment motions, we must credit these averments, as they clearly suffice to raise a genuine issue of fact. Even if we were not so bound, we have no doubt that the differences described above have little more significance technically, and are of little more professional interest to an electronic engineer, than the prices at which the receivers are sold or the nationality of their producers. Plainly, the undisputed physical differences between television receiv-

[22] For example, Vito Brugliera has stated in more than one affidavit that "television receiver sets manufactured for sale in Japan do not differ in any significant respect, either from a technical or cost standpoint, from television receivers manufactured by Japanese manufacturers or others for sale in the United States." In another affidavit, Brugliera avers, "Monochrome and color television receivers in each market are electronically identical, function by function by virtue of the NTSC standard. That components may differ between domestic and export receivers is of little consequence from a design viewpoint." And Brugliera and Karl Horn, in their expert witness report, state:

> It is our opinion that such products are comparable at the functional, technological and manufacturing level. Any purported differences, once one understands the technical issues, are not significant.

Walter Lukas, the plaintiffs' other expert witness on technical issues, explaining the model-by-model matchups which he constructed, wrote:

> In this comparison of television receivers, the following general considerations do not materially impact upon technological comparability:
>
> (1) Minor modifications of VHF and UHF tuners and video intermediate frequency amplifiers reflect a slight variance in channel allocations for the markets in Japan and the U.S. . . .
>
> (2) Power sources available for television receiver operation in Japan are 100 Volts, 50/60 Hz; in the U.S., 120 Volts, 60 Hz. (These voltage characteristics constitute the prevalent standard used for television receivers in those markets.)

Lukas concludes, "My opinion . . . is that such television receivers are practically identical in substantially all material technological respects."

ers used in the U.S. and in Japan are merely adaptations to the technical conventions of broadcasting and of electrical power transmission in the two countries.[22A] They are closely analogous to the differences necessitated by the use of the metric system in many countries, and of the traditional units in the United States, or by the use of right-hand-drive automobiles in some countries and of left-hand-drive vehicles in the United States.

Our task, however, is to determine the *legal* significance of the undisputed physical differences. We are not concerned with the technological significance of the differences unless the legal standard which we must apply is formulated in terms of their technological significance. The legal standards which are controlling here, for reasons which are stated at great length in the remainder of this opinion, do not require us to evaluate the significance of the differences as a technical matter, or to assess the extent to which they would affect an engineer designing a television receiver. Nor do the controlling legal standards require us to evaluate the differences in cost of production which result from adaptation to the differing technical conventions of the U.S. and of Japan.[23] Instead, the pertinent legal standards require us to assess the impact of the

[22A] In addition to the physical differences we have discussed, TV receivers are constructed differently to comply with legal safety standards applicable in the U.S., *see* n. 18, *supra*, and in Japan. The nature of the Japanese standards, and the physical differences which the two sets of standards necessitate, have not been developed in the record before us. Since the different safety standards render TV receivers manufactured for one market legally unmarketable in the other, this difference also supports the grant of summary judgment on the plaintiffs' 1916 Act claims with respect to television receivers.

[23] As a result, we need not consider the record which the parties have made on the relative cost of production of television receivers for the U.S. and for Japan. Specifically, we do not consider the 1974 letter of William G. Frick and the deposition testimony of Walter C. Fisher, *see* n. 14, *supra*, concerning Zenith's plans to market U.S.-made television receivers in Japan, the invest-

undisputed physical differences on consumer use and marketability. To these matters we now turn; again, the facts related are admitted by the plaintiffs and there is not the slightest doubt as to their veracity.

Zenith's Executive Vice President, Karl H. Horn, one of its highest officers and a member of its Board of Directors as well as an expert witness in this litigation, discussed the utility in Japan of TV sets designed for United States use, and *vice versa*, at his deposition. He admitted that a set designed for use here might be incapable of receiving any picture at all in Japan, let alone a satisfactory one, and conceded that sets designed for

ment that Zenith determined would be necessary to modify its product for the Japanese market, and the ultimate abandonment of Zenith's plans.

Defendants contend, on the basis of the Frick letter, the Fisher testimony, and Gordon Reichard's affidavit of April 16, 1979, that there are no genuine issues of fact as to differences in the relative cost of manufacturing television receivers for the Japanese and American markets and as to the investment required to switch production facilities from one type of receiver to the other.

Reichard avers that in order to convert a color television model manufactured for the United States market so that it could be used in the Japanese market, it would be necessary to set up special production facilities, to obtain new test equipment, and to invest a minimum of $100,000 in new capital equipment. Defendants interpret the Fisher testimony and Frick letter as support for this position, since Frick concluded that "it is not economically feasible for Zenith to enter the Japanese market with Television products," and Fisher explained the reasons for that decision in his deposition testimony. Plaintiffs' affiants Brugliera, Schupp, and Mainiero state, however, that the steps which Reichard says are necessary to change from production of U.S. to production of Japanese TV receivers may or may not be necessary, depending on other economic factors, such as production volume, and technological factors. As we have previously noted, Brugliera avers in other affidavits that the differences in the cost of manufacturing products for the U.S. market or for the Japanese market are insignificant. In light of the averments of plaintiffs' affiants, we could not conclude that there are no genuine issues of fact either with respect to the relative cost of production of U.S. and Japanese products, or with respect to the investment necessary to change over production facilities from one product to the other. For the reasons stated in the text, however, we do not view these issues as material to the disposition of the summary judgment motions.

use in Japan cannot receive two of the three major U.S. television networks in Chicago, the situs of the deposition. Mr. Horn testified, *inter alia:*

Q. Do you know whether I could walk into a Sears Roebuck store here in Chicago and buy a Sears color television set and take it over to Tokyo and plug it in and operate it?

A. You could plug it in and you could operate it. Whether you would receive any picture at all or whether you would receive a satisfactory picture is a big question mark.

Q. Would you in good conscience suggest to anyone that he take a Sears television set as they are sold in the United States and sell it to somebody for use in Japan?

A. No. . . .

Q. Could I, assuming I were to go to Tokyo or Osaka, or any large city in Japan, and walk into the department store and purchase a television set, could I bring that set as I purchased it in Japan to this country and operate it satisfactorily?

A. . . . You do not receive the U.S. low channels, 2 through 6, but you can receive without any adjustment 9 [sic] through 13 and with adjustment 7 through 9. . . .

Q. So that without modification that set in Japan would be incapable at least of receiving two of the three major television networks in the United States in Chicago?

A. Yes.

Vito Brugliera, plaintiffs' affiant and expert witness, testified at his deposition that a TV receiver manufactured for use in Japan, if used in the United States, probably would run hot and might "overheat and go" as a result of the voltage differences.[24] He testified that it would be "ridiculous" to try to use in the U.S. a receiver manufactured for use in Japan:

[24] Mr. Brugliera testified as follows:

Q. Just a simple question. If you plugged the Japanese set in the wall, do you know what would happen here in the United States?

A. If you plugged it into the wall, it would probably operate, depending on how good their power supply circuit was. It would probably run hot.

Q. Would you consider it ridiculous to try to use a Japanese set in the United States?

A. Well, in that context I would say yes, because—

Q. You consider that ridiculous apart from the question of cost?

A. Yes, because from a cost viewpoint, there is not the kind of difference.

Q. Apart from any question of cost or price of the Japanese set, would you consider it to be ridiculous to try to use that set in the United States?

A. In terms of, let's say, usable frequency allocations, I would have to agree with you.

Q. Because it wouldn't get all the U.S. channels, would it?

A. But that doesn't say the sets are different from a technological or cost viewpoint. That is a point I want to make very clear.

You would probably receive at least four or five channels here.

Q. How long could you operate it that way?

A. As I said, depending on how good their power supply design was.

Q. Suppose they had a poor power supply design.

A. Well, it would get hot.

Q. What would happen then?

A. You are talking about the AC line differences. In Japan it is 100 volts, 50 or 60 cycles. Here it is 120 volts, and from an engineering point of view, that is nothing.

Q. But what would happen to the set, anything?

A. As I said, depending on the power supply. Some of them might last indefinitely. Some of them might overheat and go. It is a function of individual design, but it is a minor engineering difference.

While Brugliera testified that certain Japanese TV sets might *not* "overheat and go" in the U.S., we do not require the moving defendants to demonstrate that there is no genuine issue of material fact with respect to overheating of particular specified models because the frequency difference, which applies to all TV receivers without exception, would by itself be sufficient to justify the grant of summary judgment.

Brugliera also testified that attempted use in the United States would be a "misapplication" of the Japanese domestic TV receiver.[25] He admitted that the alterations necessary to make a TV set manufactured for one country capable of receiving all television broadcasts in the other country are beyond the capacity of the average consumer.[26]

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[25] Brugliera testified:

A. There are two things. One is misapplication of something designed for one market versus the technology and cost associated with designing for each of those specific markets.

If you want to stretch the analogy, I will grant you would be misapplying a Japanese domestic TV model by plugging it into U.S. wall outlet, but I am saying that it is not very difficult to design for either market, knowing the environment you are going to face, and that the cost differentials are miniscule. I am saying you could build the same set and just have a different module for the power supply and substitute A or B and have a different tuner package and substitute A or B, depending upon which market you were designing for.

Q. But going really to the set as it was designed for use in Japan as opposed to this set as it was designed for use in the United States, would you state that it would be a misapplication to attempt to use the one or the other in the foreign market?

A. Yes, but that is saying, for instance, do you drive a British car in the U.S.? You normally wouldn't. You could if you wanted to.

I could take a Japanese set and use what is called a variable transformer and operate it all the time.

[26] Brugliera testified:

Q. But it is a different component or tuner in each set, is that right?

A. The tuners are different—well, if the tuners are click stop, you know, individual channels, they would be different; but, for instance, if you were using what we call a strip tuner, which is a mechanical tuner that has plastic strips in it that have resistors and capacitors and coils on them, you could use the mechanical housing in the electronic circuits and just interchange the strips . . .

Q. When you are talking about interchanging the strips, would that be from a lab or technical end? In other words, if you were a consumer—

A. A consumer could conceivably do it.

Q. Let's say the average consumer—

A. It would usually be a technician at a technical level because you normally don't want a customer getting inside the set.

Although Brugliera's statement that "you normally don't want a customer getting inside the set" was made during a discussion of strip tuners, we view it as of wider import. Brugliera admitted that modification of a set designed for use in Japan to make it operable in the U.S. requires at least the substitution of different tuner and power supply components. n. 25, *supra*. The record reveals no instances of television receivers which are designed so that the necessary substitution can be made without "getting inside the set." It follows from these facts and from Brugliera's statement quoted above that the necessary substitution would normally be made by a technician, and not by the consumer. We note that although we must, on these summary judgment motions, make all inferences in favor of the plaintiffs, we are not required to ignore the rules of logic. *See First National Bank of Arizona v. Cities Service, Co.*, 391 U.S. 253, 287-89, 88 S.Ct. 1575, 1591-92, 20 L.Ed.2d 569 (1968).

To recapitulate: (1) a receiver designed for use in Japan would not receive most U.S. broadcasts and would be in serious danger of fatal overheating; (2) the changes necessary to make the Japanese domestic set operable in the United States could not be made by the average consumer. It is clear from the admissions of plaintiffs' witnesses that any rational consumer in the United States would prefer a television receiver manufactured for use in this country to one manufactured for use in Japan, and that he would not purchase a set manufactured for use in Japan. Similarly, any rational Japanese consumer would prefer a TV set made for use in Japan to one designed for use in the United States.[27] We conclude that television receivers manufactured for use in Japan are unusable by consumers in the United States, that they are unmarketable in the U.S., and *a fortiori*, that the receivers are not commercially interchangeable.

D. *Physical Differences Between U.S. and Japanese Non-Television Consumer Electronic Products; Effects Thereof on Consumer Use and Marketability*

In addition to its claims with respect to television receivers, plaintiff Zenith Radio Corporation also complains of actionable dumping of radios, phonographs, and tape and cassette recorder/players. National Union Electric Corporation, the other plaintiff in this litigation, has limited its complaint to television receivers. Although the record with respect to simi-

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[27] *See also* n. 22A, *supra*.

larities and differences between non-television consumer elec- tronic products sold in the U.S. and in Japan is far less volumi- nous than the corresponding record with respect to TV receivers,[28] two differences are undisputed. As before, all the facts we relate are admitted by the plaintiff.

All consumer electronic products which are not solely battery-operated must be designed to accommodate the differ-

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[28] The only affidavit submitted by defendants in support of the summary judgment motions on Zenith's 1916 Act claims with respect to non-television products is that of Harry E. Ruther, Jr., an electrical engineer employed by Sears, Roebuck and Co. An affidavit of Vito Brugliera responds to Ruther on behalf of Zenith. The expert witness report of Brugliera and Karl Horn addresses itself to the comparability of non-television products, and explains the construction of Zenith's model-by-model matchups of allegedly compara- ble products. The plaintiffs' FPS sets forth Zenith's dumping claims for non-television products, vol. 17 at 8149-64, and includes voluminous price comparison reports submitted as Appendix J. The price comparisons are based on model-by-model matchups listed in the FPS at 8151-64. According to the FPS, those matchups are to be authenticated by the testimony of Horn and Brugliera, and consequently we assume that the matchups were con- structed according to the methods stated in the Horn/Brugliera expert witness report. As a result, the validity of Zenith's non-television dumping claims as set forth with preclusive effect in the FPS is dependent on the validity of the model-by-model matchups constructed by Horn and Brug- liera, which in turn depends on whether or not we share their assumption that the physical differences recounted in the text are legally significant. *See* pp. 1203-1204, *supra*.

The Ruther and Brugliera affidavits, the Horn/Brugliera report, and the model-by-model matchups in the FPS are all concerned solely with radios, phonographs, and tape and cassette recorders. None of these sources include stereo and audio instruments or electronic components, even though these two categories of electronic products were included in Zenith's complaint and counterclaim. We have previously ruled that Zenith has abandoned its dump- ing claim with respect to electronic components by failing to include them in its previous submission of model-by-model comparisons. See Pretrial Orders No. 146 at p. 233 (Feb. 27, 1979); No. 165 at pp. 76 & 97-98 (Apr. 23, 1979); No. 222 at 153-57 (Jan. 16, 1980). Since stereo and audio instruments are not mentioned in any of the evidentiary sources which we have consulted in deciding the instant motions, we do not deal with them here. At a subsequent pretrial conference we will take up the question whether or not stereo and audio instruments remain in this case. *See* n. 63, *infra*.

ences in the available power supply in Japan and the U.S. As we have explained, the voltage and frequency of alternating current differs in the electrical power systems of the two countries. Like television receivers, other consumer electronic products which operate on alternating current include a power supply component which transforms the available external electrical power into direct current at a voltage appropriate for the internal workings of the product. The electric motors in some consumer electronic products, particularly phonographs and tape recorders, may be driven by the internal power supply or may be driven directly by alternating current from the external power source. Adaptation of a product designed for use in the United States for use in Japan, or *vice versa*, requires the alteration of the power supply component and of the electric motor if it is driven directly by the external power source.

If radios, phonographs, and tape and cassette recorders designed for use in the United States were operated from the external power sources available in Japan, the audio output of all such products would include an objectionable hum. More- over, the motors of phonographs and tape and cassette recor- ders which are powered by external alternating current would operate at a slower speed in Japan, causing pronounced sound distortion. Consumer electronic products which are operated by batteries do not encounter these problems of satisfactory operation.

Another difference between products used in the U.S. and those used in Japan is specifically relevant to radios which receive FM transmissions. The standards for encoding audio information on a radio frequency for FM broadcast are identi- cal in both countries. As a result, the electronic circuits used for processing FM signals in a radio receiver may be identical in both countries. The radio frequency bands assigned to FM radio transmission are different, however. In the United States, FM broadcasts are made on a frequency band of 88 to 108 Mhz. In Japan such broadcasts are made on a frequency band of 80 to 90 Mhz. Radios which receive FM transmissions

which are designed for use in one country cannot be operated satisfactorily in the other country in that they can only receive broadcasts on the narrow part of the band, 88 to 90 Mhz, on which transmissions are made in both countries.

The plaintiff's affiant and witness aver that these differences are of no technical significance and do not affect manufacturers costs.[29] For the reasons stated at p. 1207, *supra* and at great length *infra*, we do not view the technical signficance of the differences as a decisive factor in the disposition of these summary judgment motions. Instead, the relevant factor is the effect of the undisputed differences on consumer use and marketability. It is clear that any rational consumer would prefer products which do not produce an objectionable hum or other sound distortion, and would prefer radios which can receive all broadcasts in his country on the FM band. Therefore we conclude that all consumer electronic products which are not solely battery-operated, and all radios which receive FM transmissions whether or not battery-operated, which are designed for use in the United States, are unusable to consumers in Japan, are unmarketable in Japan, and, *a fortiori*, are not commercially interchangeable with products designed for use in Japan.[30]

[29] Vito Brugliera states that "radios, phonographs and open reel and cassette tape recorders manufactured for sale in Japan do not differ in any significant respect either from a technical or cost standpoint from similar items manufactured by Japanese manufacturers or others for sale in the United States." He avers that to prevent objectionable hum "only minor technical modifications are necessary," that the problem of motor speed may be solved by a "simple mechanical modification" and that the differences in the FM band are "of no technical significance." The Horn/Brugliera report observes, *e.g.*, that the differing voltage and power frequency of alternating current in the U.S. and Japan is "easily accommodated" in tape recorders "by interchanging to components: the electric drive motor and power transformer," and concludes that the products are "technically comparable."

[30] The factual record with respect to non-television products does not include averments as to the effects of the operation in the *U.S.* of products designed for use in *Japan*. Thus we cannot add here, as we did in our discussion of TV receivers, the words "and *vice versa*." This difference is immaterial, however, for the fact that the differences stated in the text affect consumer use and marketability in Japan is sufficient by itself to preclude comparison of the products for purposes of the 1916 Act.

Having stated the undisputed physical differences between consumer electronic products manufactured for sale in the U.S. and those manufactured for sale in Japan, and having evaluated the impact of those differences on consumer use and marketability, we now turn to our analysis of the Antidumping Act of 1916.

IV. *Analysis Of The Antidumping Act Of 1916*

A. *Introduction*

The observation that the Antidumping Act of 1916 has not played a prominent role in the American jurisprudence is an egregious understatement. In fact, until the 1970's the Act was mentioned in only one reported decision, and that addressed a dispute over the availability of pretrial discovery and did not reach the merits. *H. Wagner & Adler Co.* v. *Mali*, 74 F.2d 666 (2d Cir. 1935). Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws—A Government Overview* 43 Antitrust L.J. 580, 581 (1974). It may well be that, other than the *Mali* case cited above, there was, prior to the 1970's, nary an action brought by civil plaintiffs invoking the 1916 Antidumping Act.

Nor has the Act occasioned much scholarly commentary. With the single exception noted, we have searched the antitrust treatises in vain for reference to it. That exception is a recent treatise on the application of antitrust law to foreign trade, which dispatches the Act in the following paragraph:

> The present Antidumping Act of 1921 superseded the Antidumping Act of 1916 which provided criminal penalties and a treble damage action for dumping with intent to restrain or monopolize trade or to destroy, substantially injure, or prevent the establishment of a U.S. industry. The earlier law, while still intact, has been of no significance. Not only has the 1921 Act taken its place, but the specific intent required posed a very difficult enforcement problem. However, a private treble damage case brought under the 1916 Act in 1971 is pending as of this writing.

W. Fugate, Foreign Commerce and the Antitrust Laws 412 (1973) (footnotes omitted). The "private treble damage case" mentioned in the above quotation is the instant litigation.

The Act has been construed in an earlier decision in this litigation, in which Judge A. Leon Higginbotham, Jr., our predecessor in the case, upheld the validity of the Act against constitutional attack on grounds of vagueness. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 251 (E.D.Pa.1975). Judge Higginbotham there analyzed the language of the statute and determined that the challenged terms have a clear and ascertainable meaning. *Id.* at 255-58. Besides the instant litigation, the Act has also been interpreted in three other reported cases. In *Bywater* v. *Matsushita Electric Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y.1971), and in *Schwimmer* v. *Sony Corp. of America*, 1979-1 Trade Cas. ¶ 62,632 (E.D.N.Y.1979), the courts granted summary judgment for the defendants on the issue of standing. The courts observed that the language of the provision of the 1916 Act which authorizes private treble damage actions is substantially the same as the language of 15 U.S.C. § 15, which authorizes treble damage actions for violations of the antitrust laws, and held that the rules of standing applicable under § 15 should also apply in suits brought under the 1916 Act. Thus neither opinion tells us anything about the meaning of the act itself. And in *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384, 408-09 (D.Del.1978), Judge Murray M. Schwartz decided only that the Act has no application to goods which are manufactured exclusively for importation to the United States, and are not commonly sold either in the country of their manufacturer or in third countries. Accordingly, he dismissed the plaintiff's claim that electric golf carts were imported from Poland at prices which violated the Act, since the carts were sold only in the United States.

While we find the analysis in these decisions useful, and will refer to it in our discussion, determination of the summary judgment motions which are presently before us requires a more extensive inquiry into the legislative and social history of

the Antidumping Act of 1916 than has heretofore been undertaken. This will aid in our threshold task, which is to ascertain whether the Act was intended to be part of the corpus of antitrust law, or whether the Act was intended to be "protectionist" legislation, as that term is used in discussion of tariff barriers to free trade. This is a most important endeavor, for the character of the statute is of salient concern in its construction. We also seek guidance, of course, on the narrower issues before us.

Our *modus procedendi* will be as follows. We will first examine the language of the statute itself. Next we will sketch the relevant political and legal history of the era, before the United States entered World War I, in which the Act was passed. As the Supreme Court recently observed, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669, 99 S.Ct. 1403, 1405, 59 L.Ed.2d 677 (1979), quoting *United States* v. *Union Pacific Railroad Co.*, 91 U.S. 72, 79, 23 L.Ed. 224 (1875). In review of the 64 years which have passed since enactment of the statute, we will "recur to the history of the times" in somewhat more detail than is customary in the construction of more recent statutes which arise from a more familiar social and political background. After the background is sketched, we will examine the legislative history immediately pertinent to the enactment of the Antidumping Act. Finally, we will examine the essential differences between the Antidumping Act of 1916 and the Antidumping Act of 1921.

B. *The Statutory Text*

The term "dumping" has been defined as "price discrimination between purchasers in different national markets." J. Viner, Dumping: A Problem in International Trade 4 (1966 ed.). *See Zenith, supra*, 402 F.Supp. at 259. Thus, to restate the obvious, the Antidumping Act of 1916 is a prohibition of

international price discrimination. The Act mandates a comparison of the price at which articles are imported or sold within the United States with the "actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production."[31] The Act is violated if the price in the United States is "substantially less" than the foreign "actual market value or wholesale price," after freight, duty, and incidental expenses are added thereto, and if the proscribed price discrimination is undertaken with the intent of injuring domestic industry.

1. *Similarities to Antitrust Statutes*

As a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business. Section 2 of the Clayton Act makes it unlawful "to discriminate in price between different purchasers of commodities." 38 Stat. 730 (1914).[32] This provision was in force at the time of the passage of

[31] 15 U.S.C. § 72 (quoted in full at n. 4, *supra*). The Act also permits "actual market value or wholesale price" to be calculated with respect to the principal markets "of other foreign countries to which [the articles] are commonly exported." *Id.* However, this provision is of no significance in the instant litigation since the plaintiffs have not sought to compare U.S. prices with values derived from sales of consumer electronic products in any nation other than the country of their production, Japan. In our discussion, we will frequently abbreviate the statutory language quoted in the text by referring to the "actual market value."

[32] Section 2 of the Clayton Act, as enacted in 1914, provides in full as follows:

> Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes

the 1916 Antidumping Act and, as amended by the Robinson-Patman Act of 1936, is still in force. 15 U.S.C. § 13.[33] The Supreme Court has held that the phrase "discriminate in price" embraces all differences in prices charged to different purchasers. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549, 80 S.Ct. 1267, 1274, 4 L.Ed.2d 1385 (1960). However, Section 2 of the Clayton Act, both before and after the Robinson-Patman amendments, is applicable only if both "legs" of the alleged price discrimination involve commodities which are "sold for use, consumption, or resale within the United States." *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402

> only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

38 Stat. 730 (1914).

[33] Section 1 of the Robinson-Patman Act, 49 Stat. 1526 (1936), made extensive amendments in section 2 of the Clayton Act; the amended section is often referred to simply as "the Robinson-Patman Act," since the original version of section 2 of the Clayton Act is no longer operative. In our discussion, we refer to the "Robinson-Patman amendments" and the "Robinson-Patman Act" interchangeably, depending on the context. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which is the only portion of the amended section 2 which we consider in this opinion, reads in full as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission

F.Supp. 244 (E.D.Pa.1975).[34] Hence the Clayton Act and the Robinson-Patman Act do not apply to international dumping, which involves price discrimination between commodities sold for use in the United States and commodities sold for use in foreign countries. *See id.* at 249.

In addition to its functional similarity with Section 2 of the Clayton Act and the Robinson-Patman Act, the Antidumping Act of 1916 bears other significant resemblances to the antitrust statutes. As the courts noted in *Bywater, supra*, and *Schwimmer, supra*, the standing and damage provisions of the 1916 Act are essentially the same as those applicable to the antitrust laws under section 4 of the Clayton Act, 15 U.S.C. § 15. The clause of the 1916 Act which creates criminal penalties is virtually identical to, and specifies the same penalties as, the corresponding clauses of the Sherman Antitrust Act as then in force, 26 Stat. 209 (1890). And the intent clause of the

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> may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. § 13(a).

[34] Concomitantly, in his opinion dealing with the constitutionality of the 1916 Act as against an attack for vagueness, Judge Higginbotham observed:

> As I read the Act, it forbids regular, continued price discrimination between purchasers in *different national markets* whenever the discrimination is motivated by a desire to destroy competition. . . .

402 F.Supp. at 259 (emphasis added).

1916 Act speaks in antitrust terms, limiting the scope of the statutory ban to price discrimination practiced "with the intent of destroying or injuring industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."[35] We conclude then, on the basis of the statutory text, that the 1916 Act is an antitrust, not a protectionist statute. That conclusion is strongly corroborated by the political and legal history of the relevant era, and the legislative history of the 1916 Act, both of which are discussed *infra*.

2. *Incorporation of Customs Appraisement Terminology*

On the other hand, in one important respect, the language of the 1916 Act follows contemporary customs terminology. At the time of enactment of the 1916 Antidumping Act, the phrase "actual market value or wholesale price" had a specialized meaning in the customs law of the United States, as both Judge Higginbotham and Judge Schwartz have recognized. *See Zenith, supra*, 402 F.Supp. at 257; *Pezetel, supra*, 461 F.Supp. at 409. In the Tariff Act of 1913, § III, ¶ R, 38 Stat. 189, Congress directed that customs duties based on the value of imported merchandise should be assessed upon "the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported."[36] The Antidumping Act of

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[35] It is also of some significance that the Act was introduced and passed under the heading "Title VIII—Unfair Competition." *See* pp. 1220-1221, *infra*.

[36] Whenever in our discussion we refer to "¶ R" of the Tariff Act of 1913, we mean ¶ R of Section III of that Act, which is here reproduced in full:

> "R. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the seller, shipper, or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade

1916 incorporates this entire phrase, with only one substantive change, which is irrelevant for our present purposes. The 1916 Act provides that the United States price of imported articles should be compared with "the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production."[37] The language of the 1913 Act and the 1916 Act in this respect are essentially identical.

The phrase "actual market value or wholesale price" had a long history in customs law prior to 1916. The phrase had been employed in customs appraisement statutes since the Tariff Act of 1842, § 16, 5 Stat. 563. *See generally* R. Smith, Customs Valuation in the United States 86-138 (1948). The definition of that phrase which was stated in ¶ R of the 1913 Tariff Act was essentially the same as the definition provided in § 19 of the Customs Administrative Act of 1890, 26 Stat. 139. That section of the 1890 Act was left untouched by the Tariff Act of 1897, § 32, 30 Stat. 211, which amended other sections of the 1890 Act. It was reenacted with minor changes and renumbered as § 18 in the Tariff Act of 1909, 36 Stat. 101. While the 1909 Tariff Act made several modifications in the language of § 19 of the Customs Administrative Act of 1890, only one change is perti-

in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. That the words "value," or "actual market value," or "wholesale price," whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, as defined in this Act.

38 Stat. 189 (1913).

[37] *See* n. 31, *supra*.

nent here. The 1909 Act stated explicitly for the first time what was implicit in prior customs practice, i.e., that actual market value could be determined on the basis of "similar merchandise comparable in value" with the goods under appraisement, thereby codifying prior practice. *See* pp. 1229-1230, *infra*.

What is important to note for our present purposes is that the meaning of "actual market value or wholesale price," a function of statutory definition and customs practice, remained essentially unchanged in customs appraisement law from 1890 until after the enactment of the Antidumping Act of 1916. In our discussion we refer to the 1913 Tariff Act because that was the customs statute which was in force when the 1916 Act was passed.

Paragraph R of the 1913 Tariff Act specifically prescribes the definition of "actual market value" stated therein apply "in any law relating to the appraisement of imported merchandise." *See* n.36, *supra*. Insofar as the 1916 Antidumping Act requires a determination of the value of imported merchandise, it is such a law. Moreover, Congress expressed in 1921 its understanding that the 1916 Antidumping Act was a "law relating to the appraisement of imported merchandise." In § 303(a) of the Emergency Tariff Act of 1921, Congress made a new customs appraisement provision, *see* n.59, *infra*, applicable "in any law of the United States in existence at the time of the enactment of this Act *relative to the appraisement of imported merchandise (except . . . section 801 of the Revenue Act of 1916)*." 42 Stat. 16 (1921) (emphasis added). Section 801 of the Revenue Act of 1916 is the Antidumping Act of 1916, *see* pp. 1220-1221, *infra*. The inclusion of the 1916 Act among the exceptions enumerated in § 303(a) of the Emergency Tariff Act of 1921 demonstrates that Congress considered the 1916 Act a law "relative to the appraisement of imported merchandise" to which the section would otherwise have applied.

We note, however, that even if ¶ R of the 1913 Tariff Act were not explicitly made applicable to all laws "relating to the appraisement of imported merchandise," we would still construe the language "actual market value" in the 1916

Antidumping Act as a reference to ¶ R and an incorporation thereof. For, by incorporating in the 1916 Act a phrase from contemporary customs law, Congress must have intended to direct that the appraisement of imported merchandise under the 1916 Act follow the principles set forth in the Tariff Act of 1913. "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard* v. *Pons*, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978) (citations omitted).

We will explain in detail below, *see* pp. 1229-1230 & 1234-1239, *infra*, how and why the appraisement principles of the 1913 Tariff Act permitted recourse to sales in a foreign country of merchandise which was "similar" but not identical to the merchandise under appraisement. It is our view that this rule was incorporated into the 1916 Antidumping Act by the use therein of customs phraseology drawn from the 1913 Tariff Act. However, the permissible degree of similarity was not unlimited. *See* discussion *infra*. Although the limits of the concept of similarity of goods for customs appraisement purposes were not clear in 1916, the legal standard was clarified in a line of customs decisions beginning in 1928 and continuing to the present. For the reasons to be stated in due course, we find the subsequent customs decisions applicable in the interpretation of the 1916 Act. As applied to the uncontested facts before us, and for the reasons set forth below, the standard of similarity set forth in those decisions compels us to grant summary judgment for the defendant on plaintiff's 1916 Act claims.

Although, in our view, the pending summary judgment motions might be disposed of solely because of the consequences which flow from the incorporation in the 1916 Act of the appraisement standards of the 1913 Tariff Act, we also seek guidance from the legislative history of the Antidumping Act of 1916. Before turning to the legislative history, however, we must first review the background of the statute in the law and politics of the era when it was enacted.

C. *Antitrust and Tariff Law and Politics in the First Wilson Administration*

The Antidumping Act was approved on September 8, 1916, during the last months of the first administration of President Woodrow Wilson. The Democratic Party had a majority in both houses of Congress during the Sixty-Third Congress of 1913-15 and the Sixty-Fourth Congress of 1915-17.[38] The Democratic Congresses, consonant with Party tradition in that era, were vigorously opposed to anticompetitive and monopolistic practices. The Democratic Party platform of 1912 stated the party's position on monopoly as follows:[39]

> A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.
>
> We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menance to competitive conditions . . .
>
> We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.

The Sixty-Third Congress translated its antimonopoly fervor into law with the enactment in 1914 of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq. As we have already noted, section 2 of the Clayton Act prohibited price discrimination, a practice which was then viewed as an important contributor to the growth of monopoly. *See* H.R.Rep.No.627, Pt. 1, 63d Cong.,

[38] Congressional Quarterly, Inc., Guide to Congress 182-A (2d ed. 1976). The Democrats lost control of both houses of Congress to the Republicans in the election of 1918, and lost the Presidency as well in the election of 1920.

[39] National Party Platforms, 1840-1956, at 169 (K. Parker & D. Johnson, eds.) (1956) [hereinafter cited as "Platforms"].

2d Sess. 8-9 (1914). The section was not intended to apply to international commerce. *Id.* at 7. *See Zenith, supra,* 402 F.Supp. at 248-49.

The Democratic Party's opposition to monopoly was matched by its strong support for international free trade. Adhering to their long-established position, the Democrats demanded "a tariff for revenue only." On this issue, the Democratic Platform of 1912 stated:[40]

> We declare to be a fundamental principle of the Democratic party that the Federal government, under the Constitution, has no right or power to impose or collect tariff duties, except for the purpose of revenue, and we demand that the collection of such taxes shall be limited to the necessities of government honestly and economically administered.
>
> The high Republican tariff is the principal cause of the unequal distribution of wealth; it is a system of taxation which makes the rich richer and the poor poorer; under its operations the American farmer and laboring man are the chief sufferers; it raises the cost of the necessaries of life to them, but does not protect their product or wages. . . .
>
> We favor the immediate downward revision of the existing high and in many cases prohibitive tariff duties, insisting that material reductions be speedily made upon the necessaries of life. Articles entering into competition with trust-controlled products and articles of American manufacture which are sold abroad more cheaply than at home should be put upon the free list. . . .
>
> . . . We appeal to the American people to support us in our demand for a tariff for revenue only.

The Democrats viewed the protective tariff issue as closely related to their efforts to limit the power of perceived monopolies. For example, their 1912 platform proposed that "[a]rticles entering into competition with trust-controlled products" be put on the free list, *i.e.* admitted without the payment of any

[40] *Id.* at 168-59.

tariff duties. More broadly, the Democrats believed that the protective tariffs then in force insulated domestic trusts from legitimate foreign competition. Woodrow Wilson stated their position in a 1912 campaign speech:

> The men who created the monopoly . . . are the men who have taken advantage of the protective tariff to get together to make great combinations of industry to shut out competition and to make sure that the prices are in their own control.

W. Wilson, *A Crossroads of Freedom: 1912 Campaign Speeches of Woodrow Wilson* 156 (J. Davidson, ed.) (1956). *See* F. Taussig, *The Tariff History of the United States*, 362 (1931, reprinted 1967).

The Tariff Act of 1913, known as the Underwood Tariff Act, was adopted a few months after President Wilson and the new Congress were inaugurated. It brought substantial reductions in tariff rates, as well as the reenactment in ¶ R of the appraisement provisions which we have already quoted, which were derived from existing legislation. As stated in the House Report, a principal purpose of the Tariff bill was:

> [T]o introduce in every line of industry a competitive tariff basis providing for a substantial amount of importation, to the end that no concern shall be able to feel that it has a monopoly of the home market gained other than through the fact that it is able to furnish better goods at lower prices than others.

H.R.Rep. No. 5, 63rd Cong., 1st Sess. at XVII (1913).

The Underwood tariff bill as passed in the House of Representatives included an antidumping clause which authorized the assessment of antidumping duties, but not a private cause of action, and included no injury or intent requirement. *Id.* App. at 454. The Senate Finance Committee struck out this antidumping provision, expressing its fear that the provision might be used by "an unfriendly administration" to increase tariff rates. S.Rep. No. 80, 63rd Cong., 1st Sess. at 31 (1913). *See also* 53 Cong.Rec. 10619 (1916) (Statement of Rep. Swit-

zer). The House concurred in this Senate amendment. H.R.Rep. No. 86, 63rd Cong., 1st Sess. at 28 (1913) (Conference Report).

The Republican minority of this era supported the principle of protective tariffs and resisted the Democrats' efforts to promote free trade. In its 1912 platform, the Republican Party stated:[41]

> We reaffirm our belief in a protective tariff. The Republican tariff policy has been of the greatest benefit to the country, developing our resources, diversifying our industries, and protecting our workmen against competition with cheaper labor abroad, thus establishing for our wage-earners the American standard of living. The protective tariff is so woven into the fabric of our industrial and agricultural life that to substitute for it a tariff for revenue only would destroy many industries and throw millions of our people out of employment.

However, the Republicans were unable to defend their tariff policy from Democratic attack until the adoption of the Emergency Tariff Act of 1921 and the Tariff Act of 1922, when they raised tariff rates sharply.

On June 28, 1914, the assassination in Sarajevo of Archduke Franz Ferdinand of Austria-Hungary set off a chain of events that within a few months embroiled all Europe in World War I. Since European industries were incapacitated, the war "served as protection more effective than any tariff legislation could possibly be." F. Taussig, *supra*, at 448. Not only was importation of competing European products impossible, but American goods which had previously been made only under the shelter of high duties were exported heavily to neutral markets abroad.[42]

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[41] *Id.* at 184-85.

[42] F. Taussig, *supra*, at 448-49. By the end of 1915, there was practically no unemployment except among the chronic indigent. H. Siebert & Co., The Business and Financial Record of World War Years 44-45 (1939, reprinted 1975). By 1916, "both the country's internal and its external trade reached proportions never previously witnessed." G. Fite & J. Reese, An Economic History of the United States 101 (1973). *See also*, Culbertson, Commercial

Despite the wartime prosperity of American industry, government officials and legislators of both parties feared ruinous foreign competition after the war ended. They anticipated that the European industries, in an effort to revive themselves, would resort to unfair and predatory methods of competition. The prevailing fear of unscrupulous postwar competition from European industry was expressed by Secretary of Commerce William Redfield in his 1915 annual report:

> "Unfair competition" is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and takes steps to abate the evil wherever found. The door, however, is still open to "unfair competition" from abroad which may seriously affect American industries for the worse. It is not normal competition of which I speak, but abnormal. It is a destructive type of the industrial struggle, intended to put out of being the forces opposed to it that the victor may exploit the field at will. The methods used are not those of legitimate commerce, but those of commerical offense. They aim not at development, but at conquest. When the war shall close, the public control of railways in foreign lands, the semiofficial chambers of commerce, the publicly fostered organizations which control great industries in some countries, will all exist and will all be used in an effort to recover lost commerce. The growth in the United States of industries which may menace large markets heretofore controlled from abroad will not be permitted if public and semipublic forces acting together in foreign countries can prevent it. The outreach of American industries, nay their very existence in our own land in some cases, will be resisted to the full and every stratagem of industrial war will be exerted against them. Expecting this, we must prepare for it. If it shall pass beyond fair competition and exert or

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Policy in War Time and After, 21-2 (1919). Total exports nearly doubled between 1915 and 1916. *Historical Statistics of the United States, Colonial Times to 1970*, H.R.Doc. No. 93-78, 93rd Cong., 1st Sess. 884 (1973). The surplus balance of trade in 1916 rose 182.4% over the level of the 1915 surplus trade balance. J. Williamson, American Growth and the Balance of Payments, 1820-1913, 257 (Appendix B, Table B-1) (1964).

seek to exert a monopolistic power over any part of our commerce, we ought to prevent it.

Annual Report of the Secretary of Commerce 43 (1915). Secretary Redfield continued by proposing legislative remedies for the problem, pointing out, however, that the proposed remedies should not restrain normal international competition:

> [T]he question may be said not to be whether we shall prevent such attacks but how they shall be prevented, while welcoming, indeed promoting, that normal ebb and flow of legitimate commerce between our land and all others which will provide for our people the security against exaction which is insured by reasonable competition. . . .
>
> I should prefer . . . to deal with [the problem] by a method other than tariffs, classing it rather as an offense similar to the unfair domestic competition we now forbid.

Among the Secretary's proposals was the enactment of an antidumping law:

> I also recommend that legislation supplemental to the Clayton Antitrust Act be enacted which shall make it unlawful to sell or purchase articles of foreign origin or manufacture where the prices to be paid are materially below the current rates for such articles in the country of production or from which shipment is made, in case such prices substantially lessen competition on the part of the American producers or tend to create a monopoly in American markets in favor of the foreign producer. . . .

This proposal was apparently the precursor of the Antidumping Act of 1916.

Although we have discovered no historical evidence *directly* linking Secretary Redfield's proposals to the drafting of the 1916 Antidumping Act, the circumstantial evidence is strong. In addition to an antidumping provision "supplemental to the Clayton Antitrust Act," Secretary Redfield also recommended legislation outlawing the sale of imported articles "conditioned upon the purchaser thereof not using or dealing in wares produced or sold by the competitors of the manufacturer or seller." Annual Report of the Secretary of Commerce 43 (1915). An antidumping provision and a provision following Redfield's second recommendation were introduced by the Chairman of the House Ways and Means Committee on July 1, 1916, 53 Cong.Rec. 10372, as part of the bill for the Revenue Act of 1916. See pp. 1220-1221, *infra*. As introduced, the bill included only those two provisions under the heading "Unfair Competition." *See* H.R.Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916). As enacted, the two provisions are codified at 15 U.S.C. § 72 and § 73 respectively. The antidumping provision at 15 U.S.C. § 72 is the Antidumping Act of 1916.

In addition to the preceding analysis of the bill as introduced, there is other circumstantial evidence linking the 1916 Antidumping Act to Secretary Redfield's proposal. A member of the Republican opposition stated during the debate on the Revenue Act of 1916 that the Democratic majority supported the antidumping provision to counteract "the ruinous effect of the Underwood tariff law, which Secretary Redfield warns the majority is sure to come about as soon as the war in Europe is over." 53 Cong.Rec.App. 1415 (1916) (statement of Nelson E. Matthews, R-Ohio). Furthermore, Professor Jacob Viner, an eminent contemporary authority on international trade, viewed Secretary Redfield's report as the precursor of the 1916 Antidumping Act. Explaining the origins of the Act, he wrote:

> The Wilson administration, while showing itself wholly sympathetic with the desire for adequate protection against unfair foreign competition, was determined that it should not be employed to build up sentiment for an upward revision of the existing tariff act. It therefore recommended that any measure adopted to meet the problem should be divorced from customs legislation and should take the form of a further extension to those engaged in the import trade of the restraints against unfair competition which had been imposed on domestic commerce.[1]
>
> [1]Cf. the recommendations of Mr. Redfield, Secretary of Commerce in Report of the Department of Commerce, 1915, p. 43; . . .
>
> Congress followed the recommendations of the administration. . . .

J. Viner, *Dumping: A Problem in International Trade* 242-43 (1923, reprinted 1966).

We thus have seen that the political and legal history of the era supports our conclusion from the statutory text that the 1916 Act was an antitrust based unfair competition law, not a protectionist one.

D. *Legislative History of the Antidumping Act of 1916*

The Antidumping Act of 1916 was enacted as section 801 of the Revenue Act of 1916, 39 Stat. 756. The Revenue Act was primarily intended to defray the cost of military preparedness related to the European war and skirmishes on the Mexican border, and to finance a projected federal deficit of more than $200 million for the fiscal year ending June 30, 1917. H.R.Rep. No. 922, 64th Cong., 1st Sess. 1-2 (1916); S.Rep. No. 793, 64th Cong., 1st Sess. 1-2 (1916). The Revenue Act contained provisions addressing a wide variety of subjects, including:

1. A revision of the income tax law, first enacted in 1913, and an increase in the income tax rates;
2. The imposition of the first federal estate tax;
3. The levy of a special tax on the manufacturers of munitions;
4. The imposition of miscellaneous and special excise taxes on alcoholic beverages, tobacco, and other products and activities;
5. The adoption of temporary protective tariff rates favoring domestic dye manufacturers;
6. A revision in the tariff rates for printing paper;
7. The creation of the United States Tariff Commission to study the operation of the custom laws; and
8. Prohibitions against "unfair competition" by importers, including the provision now known as the Antidumping Act of 1916.

One member of the House of Representatives commented, "Since I have been in Congress I do not remember any bill

which has dealt with such a variety of subjects." 53 Cong.Rec. 10528 (1916) (statement of Mr. Longworth).

The Revenue Act was introduced on July 1, 1916, *id.* 10372, and was presented to and approved by President Wilson little more than two months later on September 8, 1916, *id.* 14157. The antidumping clause, § 801, was one of five substantive provisions enacted in the Revenue Act under "Title VIII—Unfair Competition." The antidumping provision was passed in essentially the same form in which it was introduced by Representative Claude Kitchin (D-North Carolina), the Chairman of the House Ways and Means Committee. The discussion of the antidumping clause in the House Report reads in full as follows:

> In order that persons, partnerships, corporations, and associations in foreign countries, whose goods are sold in this country, may be placed in the same position as our manufacturers with reference to unfair competition, your committee recommends:
>
> (1) The adoption of a provision making it unlawful for a person, partnership, corporation, or association to import and systematically sell any article at a price substantially less than the actual market value or wholesale price of such article at the time of exportation, with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States; . . .

H.R.Rep. No. 922, *supra*, at 9-10. The Senate Report made no mention of the antidumping clause.

Congressional debate on the Revenue Act was dominated by Republican cries for high protective tariffs and Democratic rejoinders lauding the benefits of low tariffs and direct taxation as exemplified by the pending income and estate taxes. *See, e.g.*, 53 Cong.Rec. 10579-82 (1916) (Statement of Rep. Moore, R-Pa.). There was very little debate on the antidumping clause, and there were no references to the specific issue presently before us: the comparability of articles sold in the United States with articles sold in foreign countries.

The floor debates on the antidumping clause reveal that the motivation for the clause was the widespread fear of unfair competition from European manufacturers after the end of hostilities. The remarks of Representative Saunders (D-Virginia) were typical:

> Another feature of interest in this bill is the clause containing the antidumping provisions, designed to restrict undesirable foreign importations. . . . This country is likely to be confronted with a flood of cheap foreign manufactured products on the restoration of peace. In the effort to take over the trade which the wise legislation of the past four years has enabled our manufacturers to secure in every portion of the globe, our competitors in Europe will be likely to resort to cut throat competition under the urge of imperious necessity. Every ounce of energy in those countries is now directed toward keeping the machinery of war in motion, and all their business is related to the output of the munition factories. But when the wheels of these factories cease to turn, and the inevitable time of adjustment arrives, the foreign manufacturers of commercial wares must have business, profitable business if possible, but if not profitable, then business on any terms that will bring subsistence to the families of thousands of laborers who will turn from the forging of cannon, and the making of high explosives, the conversion of swords and spears into the implements of prosaic toil.

53 Cong.Rec.App. 1911 (1916). These sentiments were widely shared among legislators of both parties. *See, e.g.* 53 Cong.Rec. 10531 (1916) (statement of Representative Longworth, R-Ohio); *Id.* App. 1398 (statement of Representative Keating, D-Colorado). Senator Penrose (R-Pennsylvania), an opponent of the Revenue Act, spoke nonetheless of the need to prepare for "the invasion of importations which everyone confidently looks for as the war in Europe draws to a close." *Id.* 13061. The legislators' fears in this respect echoed those of the Secretary of Commerce in his 1915 Annual Report. *See* pp. 1219-1220, *supra*. *See also* 53 Cong.Rec.App. 1415 (1916) (statement of Representative Matthews, R-Ohio) (referring to the Secretary's report).

However, the 1916 Congress did not intend to retreat from the basic principle of free trade embodied in the Underwood Tariff Act of 1913 and the Democratic Party platform of 1912. The Democratic Party platform in the reelection campaign of 1916 stated:[43]

> We reaffirm our belief in the doctrine of a tariff for the purpose of providing sufficient revenue for the operation of the government economically administered, and unreservedly endorse the Underwood tariff law as truly exemplifying that doctrine.

During the debate on the Revenue Act, speakers from the Democratic majority uniformly congratulated themselves for the lowered tariffs, and attacked the Republicans for continuing to advocate protectionism. *E.g.*, 53 Cong.Rec. 10525 (statement of Representative McGillicuddy, D-Maine); *id.* 10596 (statement of Representative Dixon, D-Indiana); *id.* 13045 (statement of Senator Underwood, D-Alabama).

The House Committee on Ways and Means and the sponsor of the Revenue Act, Representative Kitchin, stated in unambiguous terms that the antidumping clause was intended to do no more than to impose on importers the same pricing restrictions which had already been imposed on domestic businesses. The committee report recommended adoption of the legislation in order that importers "may be placed in the *same* position as our manufacturers with reference to unfair competition." H.Rep. No. 922, *supra*, at 9 (emphasis added) (relevant portion quoted in full at p. 1221, *supra*). Representative Kitchin, explaining his bill at the outset of its consideration by the full House of Representatives, explained:

> We believe that the *same* unfair competition law which now applies to the domestic trader should apply to the foreign import trader.

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[43] Platforms, *supra* n.39, at 195.

53 Cong.Rec.App. 1938 (1916) (emphasis added).[44] As Congress apparently was aware, section 2 of the Clayton Act did not apply to international "dumping" transactions. *See Zenith*, *supra*, 402 F.Supp. at 248-49.

Our objective in construing the Antidumping Act of 1916 is to give effect to the intent of Congress. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). Statements in a congressional committee report recommending adoption of legislation are highly authoritative in determining the purpose of that legislation. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). *Accord*, *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *United States* v. *Auto Workers*, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957). The statements of the sponsor of legislation are also highly probative in its interpretation. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 640, 87 S.Ct. 1250, 1266, 18 L.Ed.2d 357 (1967).

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[44] The Wilson administration took the same position. The antidumping provision recommended by Secretary of Commerce Redfield was conceived as "supplemental to the Clayton Antitrust Act" and was not intended to retard "that normal ebb and flow of legitimate commerce between our land and all others which will provide for our people the security against exaction which is insured by reasonable competition: *See* pp. 1219-1220, *supra*. In a letter to the *New York Times* published on July 4, 1916, Assistant Attorney General Samuel J. Graham stated the administration's position on the pending antidumping provision:

> Any anti-dumping provision is not a matter of taxation, or, strictly speaking, tariff. It is a power exercised under the commerce clause of the constitution and not under the taxing clause. Its purpose should be to prevent unfair competition. *Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner.*

Quoted in J. Viner, *supra* n. 1, at 243 n. 1.

The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first Wilson administration, is that the statute should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Antidumping Act is price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936.[44A] And, in order to be faithful to the intention of Congress to subject importers to "the same unfair competition law," we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises. We will be guided by these principles when we address the issues raised by the instant motions for summary judgment.

Before we turn to those issues, however, we must discuss the relationship between the Antidumping Act of 1916 and the Antidumping Act of 1921. Because the 1921 Act, as we have explained above, also plays an important role in this case, analysis of the 1916 Act and derivation of its meaning would not be complete without that discussion.

E. *Relationship Between the Antidumping Act of 1916 and the Antidumping Act of 1921*

[44A] The references in the legislative history to "the same unfair competition law" do not specify the Clayton Act, and could be read to refer to the Sherman Act instead. However, the Sherman Act is not concerned primarily with price discrimination, although pricing behavior may be relevant to its prohibitions of combinations in restraint of trade and of attempted or actual monopolization. Since the 1916 Act is a price discrimination law, it makes more sense to infer that Representative Kitchin and the House Ways and Means Committee were referring to § 2 of the Clayton Act, another price discriminaton law, passed less than two years before, which is expressly limited in its scope to domestic transactions. Moreover, both Secretary of Commerce Redfield and Assistant Attorney General Graham viewed the proposed antidumping legislation as supplemental to the Clayton Act, not the Sherman Act. *See* pp. 1219-1220 & n. 44, *supra*.

In 1921, Congress enacted a law providing for the assessment of special antidumping duties on imported goods which are sold in the United States at a price lower than their fair market value. The United States Treasury Department has made a finding of dumping under the 1921 Act with respect to television receivers imported from Japan, T.D. 71-76, 36 Fed.Reg. 4597, 5 Cust.Bull. 151 (1971), and has assessed antidumping duties against many of the companies which are defendants here, as well as other importers of television receivers. The plaintiffs seek to introduce evidence of these assessments at trial.

The Antidumping Act of 1921 was recently repealed as part of the Trade Agreements Act of 1979, Pub.L. No. 96-39, § 106, 93 Stat. 193 (effective Jan. 1, 1980). However, the 1979 Act includes a new antidumping law, 19 U.S.C.A. §§ 1673-1673i (1980), which is built on the 1921 Act, S.Rep. No. 96-249, 96th Cong., 1st Sess. 15-16 (1979), U.S.Code Cong. & Admin. News 1979, p. 381, and in large measure retains the substantive law of the 1921 Act, 45 Fed.Reg.8182 (Feb. 6, 1980) (preamble to regulations implementing 1979 Act). Findings of dumping made under the 1921 Act remain in effect under the 1979 Act, § 106, 93 Stat. 193. Although the 1921 Antidumping Act is no longer in effect, we shall describe it and its legislative history briefly here in order to clarify the distinction between the instant litigation under the 1916 Antidumping Act and the administrative proceedings under the 1921 Act, and to complete the historical background of the 1916 Antidumping Act.

The Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (repealed), does not include criminal penalties for dumping, nor does it create a private right of action for treble damages. It provides only for the assessment of a special dumping duty on merchandise as to which a finding of dumping has been made. *Id.* § 161. A finding of dumping has two components: a determination by the Secretary of the Treasury that a class or kind of merchandise is sold in the United States at less than its fair value, and a finding by the International Trade Commission that a domestic industry is injured or is likely to be injured

as a result. *Id.* § 160(a). The amount of the special duty is the difference between the price in the United States and the "foreign market value" or the "constructed value." *Id.* § 161.

The genesis of the Antidumping Act of 1921 was a report of the United States Tariff Commission which concluded that the Antidumping Act of 1916 had not been effective in deterring dumping. Third Annual Report of the United States Tariff Commission (1919), *quoted in part in* H.R. Rep. No. 479, 66th Cong., 2d Sess. 2 (1919). H.R. 10918, 66th Cong., 2d Sess., a bill providing for the assessment of antidumping duties, was passed by the House of Representatives in 1919 on a voice vote. 59 Cong. Rec. 351. Representative Kitchin, who had been the sponsor of the 1916 Act, supported the 1919 bill, and explained the perceived failings of the 1916 legislation:

> In the act of 1916 . . . we have as stringent and as drastic an antidumping proposition as is contained in this bill. . . . The Tariff Commission declare that it is almost impossible to show the intent on the part of the importer to injure or destroy business in the United States by such importation and sale.
>
> That is the trouble with this antidumping act of 1916, which is now the law. You have to show the intent of the foreigner, the intent of the importer, to injure or destroy some particular industry in the United States. The business here might be injured, might be destroyed, by such importations and sales as effectively without such intent as with it.

59 Cong.Rec. 346 (1919). The Tariff Commission also identified several other problems in the administration of the 1916 Act. *See* H.R.Rep. No. 479, *supra*.

The 1919 bill was reported favorably by the Senate Finance Committee, S.Rep. No. 510, 66th Cong., 2d Sess. (1920), but never came to a vote on the floor of the Senate. In 1921, however, an antidumping provision modeled on the 1919 bill was introduced as part of the Emergency Tariff Act of 1921. *See* H.Rep. No. 1, 67th Cong., 1st Sess. 23 (1921); 61 Cong.Rec. 261 (1921) (statement of Mr. Fordney) (1921 antidumping bill "follows closely" 1919 bill). After extensive

amendment in the Senate and in Conference Committee, this provision became the Antidumping Act of 1921.

Thus the raison d'etre of the 1921 Antidumping Act was the perceived inadequacy of the 1916 Act to prevent international dumping. However, Congress chose not to amend the 1916 Act, but rather to enact an entirely new system for the assessment of special dumping duties. The particular language of the 1916 Act which concerns us in this opinion, "actual market value or wholesale price of such articles," is absent from the 1921 Act. Instead, as the preceding summary indicates, the domestic price is first compared with "fair value" as part of the initial determination of liability, and then is compared with the "foreign market value" or the "constructed value." The statute defines the latter two terms, *id.* §§ 164 & 165, and "fair value" is defined in customs regulations. 19 C.F.R. § 153.1 (1979). All three definitions permit the appraiser to make reference to "such or similar merchandise" sold in a foreign country.

The phrase "such or similar merchandise" is itself defined in a separate section of the Act, 19 U.S.C. § 170a(3). That definition grants to the Secretary of the Treasury or his delegate broad discretion to look to the value of merchandise used for like purposes which "may reasonably be compared" to the merchandise under consideration. *Id.* § 170a(3)(C). This is a much more expansive charter than that contained in the 1916 Act. If non-identical merchandise is the basis for the assessment of value, the Secretary is instructed to make "due allowance" for the differences. *Id.* § 161(b)(3). The definition of "such or similar merchandise" and the "due allowance" provision were enacted in 1958 amendments to the Antidumping Act of 1921, 72 Stat. 583 & 586. The scope of application of the expanded definition is expressly limited to the 1921 Antidumping Act. 19 U.S.C. § 170a.[45]

[45] The 1958 definition was modified by a 1975 amendment, the substance of which is irrelevant here. 88 Stat. 2048 (1975). The definition of "such or similar merchandise," as amended in 1975, was reenacted with only editorial changes in the antidumping provisions of the Trade Agreements Act of 1979, Pub.L. No. 96-39, 93 Stat. 181 (1979), 19 U.S.C.A. § 1677(16) (1980).

The foregoing explication was necessary because, as we have noted, the plaintiffs seek to introduce into evidence the findings and assessments by the Treasury Department against various defendants for violation of the 1921 Act, asserting that they establish sales below Japanese fair market value; hence the low price export conspiracy. Plaintiffs also proffer defendants' alleged attempts to cover up the 1921 Act violations as evidence of their conspiratorial intent. A few words are thus in order about the implications of the 1921 Act assessments.

In assessing antidumping duties under the 1921 Act, the Treasury Department determined the "foreign market value" of television receivers sold in Japan on the basis of technical comparisons broadly similar to the comparisons which plaintiffs offer in this litigation.[46] When Congress enacted the 1958 amendment defining the phrase "such or similar merchandise" expansively for purposes of the 1921 Act, it did not amend the 1916 Act by making that definition applicable to the determination of "actual market value or wholesale price" under the 1916 Antidumping Act, although it might have done so. Since that provision of the 1921 Act, as amended in 1958, does not apply to the 1916 Act, private litigants under the 1916 Act are not clothed with the Treasury Department's broad discretion to consider sales of any merchandise which it deems reasonably comparable. Therefore, the fact that the Treasury Department has made certain technical comparisons is of no significance for the dumping claims in the instant litigation. Nor is the fact that the Department has assessed dumping duties on the basis of those comparisons relevant to the 1916 Act claims. The 1916 Act clearly does not create a private right of action for

[46] The plaintiffs have submitted as an exhibit to their reply to the instant summary judgment motions a memorandum to his file written by Lou Balaban of the United States Customs Service, dated April 17, 1975, which summarizes the technical comparisons undertaken by the Customs Service. Exhibit 12, Vol. 5 of Appendix to Plaintiffs' Memorandum in Opposition to Motions for Summary Judgment of Defendants Mitsubishi Electric Corporation and Melco Sales, Inc. (filed Oct. 16, 1978).

violations of the 1921 Act. Instead, as we have previously concluded, the 1916 Act must be construed in light of its incorporation of the appraisement provisions of the Tariff Act of 1913 and of its purpose of extending to importers "the same unfair competition law" applicable to domestic commerce under the Clayton Act.

The question remains whether the Treasury Department's technical comparisons, and the findings and assessments made by the Treasury Department and the International Trade Commission with respect to dumping under the 1921 Act, are relevant to plaintiffs' claims under Sections 1 and 2 of the Sherman Act. We hasten to add, therefore, that we express no opinion as to whether or not any of the findings or comparisons made under the 1921 Act are admissible to support plaintiffs' Sherman Act case; nothing in this opinion involves consideration of the Sherman Act claims.

Against the background of the preceding many-faceted discussion of the text and history of the 1916 Act, we turn to the critical question of the degree of similarity which the Act requires for product comparisons.

V. *The Degree Of Similarity Required For Product Comparisons Under The 1916 Antidumping Act*

A. *Introduction*

In this part of the opinion, we draw upon the more general analysis of the 1916 Antidumping Act which we undertook in Part IV, and decide the specific questions of statutory construction which the parties have raised in their motions and in the responses thereto. Initially, we consider and reject defendants' principal argument: that because of the use of the phrase "such articles" in the text of the 1916 Act, we should impute to Congress a determination that the Act have no application unless identical goods are sold in the United States and in the relevant foreign market, in this case Japan. We reject that argument for five distinct reasons, which are stated more fully

infra: (1) Of the customs decisions upon which defendants rely, only one predates the passage of the Act in 1916, and that decision does not support defendants' construction; (2) the defendants' construction departs from the ordinary meaning of the word "such;" (3) the interpretation of the word "such" adopted in the customs decisions upon which defendants rely is compelled by the disjunctive language of the statutes construed there, and no equivalent consideration supports the adoption of the same construction here; (4) defendants' construction would exempt from the reach of the 1916 Act transactions in non-identical goods which are within the scope of domestic price discrimination law, contrary to the intent of Congress; and (5) defendants' construction of the 1916 Act is inconsistent with the incorporation therein of the customs appraisement standards of contemporary law.

Since we reject the contention that only identical articles may be compared as the basis for dumping claim under the 1916 Act, we address ourselves next to elucidating the precise degree of similarity which the Act requires. In determining how similar articles must be in order to be compared in litigation under the Antidumping Act of 1916, we have consulted two sources to guide our interpretation of the statute.

First, we have looked to the standard governing product comparisons under section 2 of the Clayton Act, as amended by the Robinson-Patman Act. As we found in examining the legislative history of the 1916 Antidumping Act, Congress intended the 1916 Act to extend to importers the same price discrimination law applicable to domestic commerce. The standard which applies under the Robinson-Patman Act is that products must be "of like grade and quality" to give rise to liability for price discrimination. As is explained *infra*, we find that the same standard of "like grade and quality" limited product comparisons under section 2 of the Clayton Act prior to the Robinson-Patman amendents. Since the Clayton Act was passed in 1914, the same standard is applicable under the Antidumping Act of 1916.

Secondly, we have construed the 1916 Act in light of the incorporation therein of the appraisement provisions of ¶ R of the Tariff Act of 1913 through use of the language "actual market value or wholesale price." While the 1913 Tariff Act authorized customs appraisers to refer to sales of similar merchandise, the degree of similarity required was not formulated in any precise way until after passage of the Tariff Act of 1922. We view the decisions of the Court of Customs Appeals interpreting the term "similar" as used in § 402(b) of the 1922 Tariff Act as controlling in our interpretation of the 1913 Tariff Act, since the valuation provisions of the 1922 Tariff Act were intended to continue the valuation system of the 1913 Tariff Act, and there is no reason to believe that customs practice was changed in 1922.

The standards of similarity which we derive from these two sources are consistent with each other, at least as applied to the case at bar. The Robinson-Patman standard has been formulated in the following terms:

> [I]f there are substantial physical differences in products affecting consumer use, preference or marketability, such products are not of "like grade and quality" regardless of manufacturing costs.

Checker Motors Corp. v. *Chrysler Corp.*, 283 F.Supp. 876 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969). In an unpublished opinion, the U.S. Court of Appeals for the Third Circuit has adopted the *Checker Motors* formulation. *See* p. 1233, *infra*. The Tariff Act standard was stated by the Court of Customs Appeals as follows:

> [I]f goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar.

United States v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19, 25 (1928). Although there are verbal differences between the two formulations, both focus on physical differences, commercial interchangeability, and consumer use. That focus is decisive for the present motions.

We first address defendants' "such articles" argument. Following that, we turn to explication of the "like grade and quality" standard, and thereafter to the standard of similarity under the Tariff Acts.

B. *Applicability of the 1916 Act to Non-Identical Goods*

The defendants argue that the Antidumping Act of 1916 has no application here unless the goods sold in the United States and the goods sold in Japan are identical. Their argument is based on the use of the term "such articles" in the Act, which provides in pertinent part:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold *such articles* within the United States at a price substantially less than the actual market value or wholesale price of *such articles*, at the time of exportation to the United States, in the principal markets of the country of their production. . . .

15 U.S.C. § 72 (emphasis added). The defendants contend that the second use of the phrase "such articles" in the above-quoted portion of the statute refers to articles sold in the foreign market, i.e. Japan, and limits the purview of the statute to sales in Japan of articles which are identical to those sold in the United States.[47] The plaintiffs reply that the phrase "such articles" has the same meaning in both places in which it appears in the quoted portion of the statute; that the phrase refers to the articles which are imported into the United States; and that the imported articles can have an "actual market value or wholesale price . . . at the time of exportation to the United States, in the principal markets of the country of

[47] The first use of "such articles" in the quoted portion of the statute plainly refers to the articles which are imported into the United States.

their production" even though no identical articles are sold in the country of their production. We agree with plaintiffs on these points.

The defendants have cited to us nothing in the legislative history of the Antidumping Act of 1916 which indicates that any member of Congress intended the word "such" to mean "identical" or, indeed, that any member of Congress gave any thought at all to the meaning of the word "such." Instead, they have referred us to a line of customs decisions construing the term "such" in the phrase "such or similar merchandise" or "such or similar imported merchandise" in customs appraisement statutes.

The earliest of these decisions, and the only one preceding the enactment of the Antidumping Act in 1916, is *Beer* v. *United States*, 1 Ct.Cust.App. 484 (1911). In *Beer*, the Court of Customs Appeals held that the word "such" in the phrase "such or similar merchandise," as employed in section 11 of the Customs Administrative Act of 1890, meant, "the precise importation as sold by the importer himself." *Id.* at 486-87. *Beer* does not support the defendants: it implies that "such articles" means the very articles imported into the United States, while the defendants' position is that "such articles" refers not to the imported articles, but to other articles sold in Japan which are identical to them. Instead of supporting the defendants, *Beer* supports the plaintiffs in their contention that the phrase "such articles" refers to the articles imported into the United States in both its uses in the 1916 Act.

Subsequent decisions of the Court of Customs Appeals appear superficially to be more favorable to the defendants' positions. In *United States* v. *Johnson Co.*, 9 Ct.Cust.App. 258, T.D. 38215 (1919), the court ruled that "the word 'such' means 'identical'," interpreting ¶ L of the Tariff Act of 1913. This interpretation was soon extended to the same phrase where it occurred in section 402(b) of the Tariff Act of 1922, *United States* v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19, T.D. 42714 (1928); *United States* v. *Meadows Wye & Co., Inc.*, 15 Ct.Cust.App. 451, T.D. 42643 (1928), and apparently has

been followed ever since. *See, e.g., E. J. Brach & Sons* v. *United States*, 317 F.Supp. 264, 269, 65 Cust.Ct. 718, R.D. 11721 (1970); *United States* v. *Ford Motor Company*, 46 Cust.Ct. 735, A.R.D. 124 (1961). Relying on this line of cases, the defendants would have us rule that the phrase "such articles" in its second appearance in the Antidumping Act of 1916 means "identical articles, but not the very articles imported." Their position is unacceptable for several reasons.

First, as we have noted, the only decision which predates passage of the 1916 Act is inconsistent with the defendants' contention. While subsequent judicial interpretations of related customs statutes may be helpful in the construction of the 1916 Antidumping Act in the appropriate circumstances, *see* pp. 1234-1238 *infra*, the logical link between the 1916 Act and the decisions cited by defendants is highly tenuous. We cannot impute to Congress an intention to adopt in 1916 a judicial construction which was first announced in 1919 (even if the 1919 decision were favorable to defendants, which in fact it is not).

Second, the construction urged by defendants does not square with a fundamental canon of statutory construction: "unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). We cannot say that the ordinary meaning of the word "such" is, or was in 1916, as narrow or as precise as defendants urge. Indeed, the plaintiffs have produced copies of many dictionary definitions showing that the word "such" has now and had in 1916 numerous meanings and shades of meaning. While the "ordinary meaning" rule does not help us to select one construction out of the many definitions in common use in 1916, it cautions us not to impute a specialized meaning to the word "such" except on the basis of a strong showing that Congress intended a specialized meaning.

Furthermore, the decisions cited by defendants all involve construction of the statutory phrase "such or similar merchan-

dise" or "such or similar imported merchandise." As a result, the interpretation of "such" adopted in the customs cases is compelled by the disjunctive language of the statutes construed in those cases. A familiar maxim of statutory construction is that words in a statute should not be construed as mere excess verbiage. *E.g., Application of Barker*, 559 F.2d 588, 591-92, (Cust. & Pat.App.1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978); *United States* v. *Johnson*, 462 F.2d 423, 428 (3d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1396, 35 L.Ed.2d 602 (1973). For example, in *Irving Massin, supra*, the Court of Customs Appeals explained the reasons for its interpretation of the phrase "such or similar merchandise" by referring to this same principle:

> If the word "similar" means no more than the word "such," then there is no reason for it being used in the statute. To so construe it, is to lose sight entirely of the ordinary meaning of the word and to adopt a construction based upon the theory that Congress has employed useless and unnecessary language in drafting this act, which, under ordinary circumstances, we may not do. "Similar" merchandise must be construed as different from "such" merchandise in order to give this statute full effect.

16 Ct.Cust.App. at 24 (citation omitted). If the word "such" in the phrase "such or similar" were interpreted to mean anything other than "identical," the word "similar" would be mere surplusage. No equivalent consideration requires or supports the adoption of the same construction here.

Fourth, the legislative history of the 1916 Antidumping Act reveals that the Act was intended to apply to importers "the same unfair competition law" which controlled the pricing decisions of domestic traders. Section 2 of the Clayton Act, the relevant law regulating domestic commerce, did not and does not have so limited a scope as to apply only to discrimination in price between purchasers of articles which are identical to each other. Instead, as is explained in greater detail *infra* at pp. 1231-1234, section 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, prohibits discrimination in price between purchasers of articles of "like grade and quality." If

we were to adopt the defendants' proposed reading of the 1916 Antidumping Act, we would be unfaithful to the clearly expressed intention of Congress that importers be subjected to the same pricing law applicable domestically, for the standard of comparability of goods would be narrower under the 1916 Act than under the Clayton Act.

Fifth and finally, the construction urged by the defendants is not consistent with the incorporation in the 1916 Act of the customs appraisement standards of contemporary law. Paragraph R of the Tariff Act of 1913 specifically endorses the appraisement of imported goods by reference to the value of goods sold abroad which are similar but not identical to the goods under appraisement. That paragraph provides, in pertinent part:

> That the words "value" or "actual market value," or "wholesale price," whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of *such, or similar merchandise comparable in value therewith*, as defined in this act.

38 Stat. 189 (emphasis added).[48] In one of the customs decisions upon which the defendants principally rely, the Court of Customs Appeals held in unambiguous terms that the provision we have quoted "authorizes that in arriving [at a determination of actual market value] appraising officers may not only take into consideration sales of the very merchandise imported but sales of similar merchandise." *United States* v. *Johnson Co.*, 9 Ct.Cust.App. at 270, T.D. 38215 (1919).

The statutory provision merely codified the long-established practice whereby customs appraisers would advert to sales abroad of merchandise similar to that undergoing appraisement. The pertinent language of the 1913 Act was a reenactment of an identical provision in the Tariff Act of 1909, § 18, 36

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[48] For reasons stated at pp. 1215-1217, *supra*, "actual market value" under the 1916 Antidumping Act must be construed to conform to the provisions of ¶ R. of the 1913 Tariff Act.

Stat. 101. While the 1909 provision was the first specific statutory authorization for reference to "similar merchandise comparable in value" in customs appraisement, it codified prior practice. Earlier customs statutes had made it the duty of customs appraisers "by all reasonable ways and means . . . to ascertain, estimate, and appraise . . . the actual market value and wholesale price of the merchandise." *E.g.*, Customs Administrative Act of 1890, § 10, 26 Stat. 136. The Secretary of the Treasury interpreted the latter provision to require appraisers to look to the value of similar merchandise when necessary:

> Where no sales of identical merchandise are made in the country of production, either for consumption or for export, the market value of similar goods of other manufacturers actually sold should be ascertained and be taken into account.

Treas.Dec. 3222 (1877), reiterated in Treas.Dec. 5806 (1883). *See Erhardt* v. *Ballin*, 150 F. 529 (2d Cir. 1906); *1,209 Quarter Casks and 1,235 Octaves of Sherry Wine*, 2 Benedict 249, 280-81, 24 Fed.Cas. 398, 409 (S.D. N.Y.1868).

We thus are brought full circle, finding the true congruence between the customs appraisement standards of contemporary (1916) law and the notion of comparable non-identical articles. The defendants, arguing for their narrow construction of the term "such articles," have tried to treat these matters as discrete. They direct our attention only to the interpretation of the word "such" in decisions like *Johnson, supra*, while ignoring the context in which the word "such" received that narrow interpretation—a system of customs appraisement in which reference to the value of similar and comparable merchandise was specifically authorized by statute. Their approach does not comport with either logic or reality.

[12] We interpret the phrase "such articles" in the 1916 Act to refer to the articles imported into the United States, and not to other articles sold in Japan which are identical to the imported articles. Our construction follows *Beer* v. *United States, supra*, the only relevant customs decision predating

passage of the 1916 Act. Moreover, our construction conforms to the frequent use of the word "such" in statutes and other legal writing (as well as common usage) to refer back to what has already been stated. In the 1916 Act, the phrase "such articles" merely refers back to the initial use of the word "articles," and does not modify the meaning of the word "articles." In grammatical terms, the word "such" is here used as a pronoun, and not as an adjective.

The actual market value of the imported articles may be determined by reference to sales of similar articles in Japan, for the reasons stated above. The absence of the word "similar" from the text of the 1916 Antidumping Act is not material. By use of the term of art "actual market value," Congress incorporated into the 1916 Act a system of customs appraisement which specifically authorized appraisers to look to the value of goods which were similar but not identical to the goods being appraised. That practice was explicit in the customs statute which was in force in 1916, and had been the policy of the Treasury Department at least since 1877.

Although the foregoing analysis makes it clear that the "actual market value or wholesale price" of the imported articles may be determined by reference to *similar* articles sold in the country from which the articles are imported, our inquiry does not end here. The meaning of the word "similar" in the context of the appraisement of imported merchandise is itself far from pellucid. The remainder of this opinion is devoted mainly to ascertaining the degree of similarity required for product comparisons under the 1916 Antidumping Act, and to applying the standard we formulate to the facts before us.[49]

[49] Although the plaintiffs' affiant and expert witnesses aver that U.S. and Japanese consumer electronic products are "comparable" and "similar," their opinions are not controlling. We cannot stop our inquiry here and rule that there is a genuine issue of fact as to the similarity of the products, without exploring the legal standard in greater depth. As we demonstrate in the text to follow, there are available sources of law which control the interpretation of the term "similar" in this litigation. One such source is the Clayton Act, as amended by the Robinson-Patman Act, which is considered

C. *The Standard of "Like Grade and Quality" Under the Clayton Act and the Robinson-Patman Act*

As we have repeatedly stated, the 1916 Antidumping Act was intended to subject importers to the same price discrimination law which applied to domestic commerce. The imposition of liability under the 1916 Act on the basis of product comparisons which could not be the basis for application of the domestic price discrimination law would subject importers to *more rigorous* legal strictures than those applicable to domestic business, since their pricing flexibility would be more limited than that of domestic businesses. Since we may not convert the 1916 Act into protectionist legislation contrary to the intent of Congress, see discussion *supra*, we must construe the 1916 Act to harmonize with domestic price discrimination law.

Since the 1916 Antidumping Act is a price discrimination law, we are also mindful of the Supreme Court's admonition against overbroad interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80, 99 S.Ct. 925, 933, 59 L.Ed.2d 153 (1979), *quoting Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63, 73 S.Ct. 1017, 1019, 97 L.Ed. 1454 (1953). This warning is equally applicable to the 1916

at pp. 1231-1234, *infra*. The other source is customs appraisement law, which is considered at pp. 1234-1239, *infra*. As the court observed in *Nichols & Company* v. *United States*, 59 C.C.P.A. 67, 72, 454 F.2d 1183, 1187 (1972), "the word 'similar' has a very specific and slightly out of the ordinary meaning in this context in customs law."

Given the more precise legal standard governing the comparability of products, which is derived from these two sources of law, we shall hold that the issues of fact as to the technical comparability of U.S. and Japanese consumer electronic products, while genuine, are not material. Although plaintiffs' affiant and witnesses characterize the technical differences between U.S. and Japanese products as minor or insignificant, the legal significance of those differences is an issue of law to be decided by the court. Legal conclusions stated in an affidavit or an expert witness report do not raise an issue of material fact so as to preclude the grant of summary judgment.

Antidumping Act, another price discrimination law with the same potential for encouraging price rigidity of imported goods.[50]

When the Antidumping Act of 1916 was passed, price discrimination in domestic commerce was prohibited by section 2 of the Clayton Act, ch. 323, 38 Stat. 730 (1914), which subsequently was amended by the Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13). Neither statute applies to international price discrimination, because they prohibit discrimination in price between different purchasers of commodities only if both commodities are "sold for use, consumption, or resale within the United States." 15 U.S.C. § 13(a); 38 Stat. 730. In an earlier decision in this case, Judge Higginbotham determined that the Clayton Act, as amended by the Robinson-Patman Act, does not reach price discriminations between different national markets. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 244 (E.D.Pa.1975).

Under section 2 of the Clayton Act, it was an affirmative defense that price differences were "on account of differences in the grade [or] quality" of the commodities sold.[51] In *Boss Manufacturing Co.* v. *Payne Glove Co.*, 71 F.2d 768 (8th Cir.),

[50] The Justice Department has trenchantly criticized the economic impact of the Robinson-Patman Act. United States Department of Justice, Report on the Robinson-Patman Act (1977). Without expressing any opinion on the economic arguments of the Justice Department report, we note our concurrence with the Department's observation that the use of the word "discrimination" to describe the behavior forbidden by the Robinson-Patman Act and by the 1916 Antidumping Act carriers with it no undertones of moral condemnation:

> The word 'discrimination' has a pejorative connotation derived from its use in other contexts, e.g., racial or religious discrimination. A proper understanding of its use in economic terms requires a conscious effort to disassociate the word's social meanings.

Id. at 4 n. 4.

[51] 38 Stat. 730. *See* n. 32, *supra* (quoting section 2 of the Clayton Act in full).

cert. denied, 293 U.S. 590, 55 S.Ct. 104, 79 L.Ed. 684 (1934), the earliest decision interpreting the words "grade" and "quality" in section 2, the court of appeals looked to "the physical facts," rejecting opinion testimony that there were no differences between the two lines of products under comparison.[52] The court concluded that certain cotton flannel gloves and mittens that were similar in construction and appearance to other products sold by the defendants, but of a cheaper grade of material and made by less expert workmen, were not of the same "grade and quality" sufficient to invoke section 2 of the Clayton Act. By focusing on the physical differences between the two lines of gloves and mittens, the court of appeals implicitly rejected the view that the products were comparable because they were within the same common-sense generic categories of "gloves" and "mittens," or were functionally equivalent.

In 1936, the Robinson-Patman amendments shifted the burden to the plaintiff to show that a supplier's products involved in the price differentiation are of "like grade and quality." However, there is no indication in the legislative history that the 1936 Congress intended to alter the substantive meaning of the terms "grade" and "quality" as used in the Clayton Act. *See* F. Rowe, Price Discrimination Under the Robinson-Patman Act 64-65 (1962); Report of the Attorney General's National Committee to Study the Antitrust Laws 157 (1955). Nor have we found any such indication in subsequent case law.[53]

[52] 71 F.2d at 771. The opinion cited was written by Judge Wyman. Judge Sanborn concurred, stating, "I agree that the evidence was insufficient to justify the conclusion that there was no difference between the special gloves and the regular gloves offered by defendant to the trade . . .," but finding other grounds dispositive. The third member of the panel, Judge Stone, dissented.

[53] As the Supreme Court has observed, "the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them." *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 544, 80 S.Ct. 1267, 1271-1272, 4 L.Ed.2d 1385 (1960). Thus if any change were intended by Congress in altering the verbal formulation of the "grade" and "quality" provisions, the change must have been in the direction of expanding the coverage of the Act. In other words, the "like grade and quality" provision of the Robinson-Patman Act must adopt either the same standard as the corresponding provision of the Clayton Act, or a less exacting standard which broadened the coverage of the Act. If the moving parties can show that the products are insufficiently similar to meet the standard of "like grade and quality," then a *fortiori* the products are insufficiently similar to meet the equally or more exacting standard of the pre-1936 Clayton Act.

Since the standard of "like grade and quality" governs product comparisons under the price discrimination laws applicable to domestic sellers since 1914, and since the Antidumping Act of 1916 was intended to apply the same law to importers, we hold that any reference to sales in a foreign country for the purpose of establishing a claim of international price discrimination under the Antidumping Act of 1916 must be limited to sales of articles which are "of like grade and quality" to the articles sold in the United States, as that term is employed in the Robinson-Patman Act. Put differently, we hold that although the "actual market value or wholesale price" of imported articles in a foreign country may be determined by reference to sales of similar merchandise in the foreign country, the similar merchandise sold in the foreign country must be of "like grade and quality" to the articles sold in the United States, as the latter term is employed in the Robinson-Patman Act. Any other interpretation of the 1916 Act would not be consistent with the clearly expressed intent of Congress.

The standard governing product comparisons under domestic U.S. price discrimination law was stated succinctly by Judge Mansfield in *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969): "[I]f there are substantial physical differences in products affecting consumer use, preference or marketability, such

products are not of 'like grade and quality' regardless of manufacturing costs."[54] An illustrative application of this standard is the decision of the Federal Trade Commission in *Universal-Rundle Corp.*, 65 F.T.C. 924 (1964), *order set aside on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967). In that decision, the Commission ruled that two lines of bathroom fixtures manufactured by the respondent were not of like grade and quality even though they were made from the same raw materials by means of the same manufacturing operations. The Commission held that slight differences in the dimensions and water level of two bathtubs, and the use of built-in soap dishes in one tub but not the other, which differences affected the marketability of the bathtubs and were not artificial or fanciful, rendered the bathtubs not of like grade and quality, and precluded application of the Robinson-Patman Act.[55]

In an unpublished opinion, the U.S. Court of Appeals for the Third Circuit has adopted the standard of "like grade and quality" stated by Judge Mansfield in *Checker Motors, supra*. *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc.*, No. 73-2101, slip op. at 4 (August 5, 1974) (disposition noted at 500 F.2d 1401 [3d Cir.]), *rev'g* 1973-2 Trade Cases ¶ 74,816 (D.N.J.1973). The district court in *Willow Run* had granted summary judgment for the defendants in a suit alleging violation of the Robinson-Patman Act. The district court ruled that there were no genuine issues of material fact, and found that

[54] In *Checker Motors*, the plaintiff claimed that Chrysler sold automobiles for use as taxicabs at a lower price than it sold similar automobiles for use as private passenger cars, in violation of the Robinson-Patman Act. The defendant moved for summary judgment, arguing that its taxicabs and its private cars were not "of like grade and quality." The court stated the standard by which "like grade and quality" would be determined, and denied summary judgment on that issue because there was a genuine issue of material fact as to whether or not the differences between Chrysler's taxicabs and its passenger cars were "substantial enough to affect consumer use, preference or marketability." 283 F.Supp. at 889.

[55] 65 F.T.C. at 953-55. *See also id.* at 939-45 (Initial Decision with extensive discussion of relevant law).

Christmas trees and related products sold by the defendant to two different purchasers at different prices were not of "like grade and quality." The court of appeals reversed the grant of summary judgment. The appellate court observed that there were conflicting affidavits in the record as to the effect of the differences between the products sold to the two purchasers upon consumer use, preference or marketability, and held that there was a genuine issue of material fact which barred the grant of summary judgment on the "like grade and quality" issue. After discussing the conflicting affidavits, the court of appeals stated:

> Whether the differences between the various items in each category are minor and insubstantial, as claimed by Willow, or *material enough to affect consumer use, preference, or marketability*, present questions which cannot properly be resolved upon a motion for summary judgment. *See Checker Motors Corp.* v. *Chrysler Corp.*, 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 [2d Cir.], *cert. denied*, 394 U.S. 999 [, 89 S.Ct. 1595, 22 L.Ed.2d 777].

Slip op. at 4 (emphasis added).

The other courts and secondary authorities which have interpreted the statutory phrase "like grade and quality" have followed the same approach as that adopted in *Checker Motors*, *supra*, and *Universal-Rundle, supra*, although the verbal formulation of the relevant factors sometimes differs slightly from the one we have quoted. For example, in *Atlanta Trading Corp.* v. *FTC*, 258 F.2d 365, 369-71 (2d Cir. 1958), the Second Circuit applied the "like grade and quality" test in the interpretation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, and concluded that various pork products were not of like grade and quality despite their common source. In *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F.Supp. 312, 319 (N.D.Ill.1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 50, 7 L.Ed.2d 32 (1961), the court held that two types of ice cream, one of which was richer in butter fat than the other, were not of like grade and quality. And in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 1974 Trade Cases ¶ 75,054 at

pp. 96,742-44 (D.Utah 1974), *rev'd on other grounds*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977), the court found that different mixtures of rocket fuel which were identical in functional customer usage were of like grade and quality. *See also Quaker Oats Co.*, 66 F.T.C. 1131 (1964); American Bar Association, Antitrust Law Developments 115 (1975); F. Rowe, Price Discrimination Under the Robinson-Patman Act 69 (1962); Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

In a subsequent part of this opinion, we will apply the Robinson-Patman standard to the facts before us. First, however, we turn to an examination of the degree of similarity required to make two articles "similar merchandise" under the Tariff Act of 1913. That inquiry uncovers a standard of similarity which is analogous to the Robinson-Patman standard, and constitutes an alternate holding supporting our disposition of the summary judgment motions.

D. *The Standard of Similarity Under the Tariff Acts*

In Part IV, *supra*, we ruled that the phrase "actual market value or wholesale price" in the Antidumping Act of 1916 was drawn from the Tariff Act of 1913. Following the principle stated in *Lorillard* v. *Pons, supra*, we found that Congress intended the phrase to have the same meaning in the 1916 Antidumping Act as it had in the 1913 Tariff Act. In Part V-B, *supra*, we found that the Tariff Act and customs practice permitted appraisers to look to "similar merchandise comparable in value" in order to determine the "actual market value" of the imported merchandise. We are now concerned with the construction of the Tariff Act of 1913, as implicitly incorporated by reference in the Antidumping Act of 1916, in order to determine what degree of similarity is required. As the Court of Customs and Patent Appeals has recently stated, "the word 'similar' has a very specific and slightly out of the ordinary meaning in this context in customs law." *Nichols & Co.* v. *United States*, 59 C.C.P.A. 67, 454 F.2d 1183, 1187 (1972).

There are no reported judicial decisions construing the phrase "similar merchandise comparable in value" in ¶ R of the Tariff Act of 1913. The reason is simple: by statute, the decisions of appraisers were not subject to judicial review, in the absence of fraud or of jurisdictional defects. Tariff Act of 1913, ¶ M, 38 Stat. 187; Customs Administrative Act of 1890, § 13, 26 Stat. 137. *See Muser* v. *Magone*, 155 U.S. 240, 15 S.Ct. 77, 39 L.Ed. 135 (1894); *Beer* v. *United States, supra*. In 1922, Congress for the first time made appraisement decisions appealable to the Court of Customs Appeals on questions of law. Tariff Act of 1922, § 501, 42 Stat. 966.

Although appraisement decisions were not reviewable in court before 1922, they were subject to administrative review before the Board of General Appraisers. Appraisements could be appealed in a two-step process: first, to a single member of the Board of General Appraisers, and then to a panel of three members, sitting as an administrative court of last resort on appraisement matters. Tariff Act of 1913, ¶ M, *supra;* Customs Administrative Act of 1890, § 13, *supra*.

There are apparently only two reported decisions of the Board of General Appraisers which involve interpretation of the phrase "similar merchandise comparable in value therewith" in ¶ R of the Tariff Act of 1913. Both decisions are reproduced in full in footnotes 57 and 58 *infra*.[56] In the first, the General Appraiser ruled that photographic dry plates sold in England were similar to plates imported into the United States. The only difference between the plates which is mentioned in the General Appraiser's opinion is their size. The General Appraiser commented that to hold ¶ R inapplicable whenever "merchandise in every minor detail the same as that

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[56] Some decisions of the General Appraisers were published in the reports of Treasury Decisions; others were published only in reports called Reappraisement Circulars, and are cited as "C.R. ____," an abbreviation which may stand for "Circular Reappraisement." The decisions reproduced at n. 57 & n. 58, *infra*, are in the latter group. We thank Ms. Margaret Evans, Librarian of the United States Customs Court, for making copies of these decisions available to us.

the subject of appraisement" has not been sold "would be simply to create chaos in the work of appraising officers."[57] In the second decision, the General Appraiser decided that glass chimneys for street lamps which were straight were similar to glass chimneys which were made with a bulge. The General

[57] McClelland, G. A.—Decided January 28, 1921.—Opinion.—

The Merchandise which is the subject of this appeal consists of photographic dry plates 3 1/4 by 4 inches, imported from London and invoiced at 2/6 per dozen, less 40 per cent discount. The appraiser advanced them to 3/-per dozen, allowing the same discount. The importing company seeks to maintain the invoice value upon the theory that while similar photographic dry plates are manufactured and sold in England for home consumption this particular size is manufactured expressly for export, and that by reason of such fact the market value ought to be found under the last provision of paragraph L of the tariff act of 1913 based upon the selling price of such plates in the United States, due allowance by deduction being made for estimated duties, etc., as therein provided.

From the evidence submitted I do not believe that this contention is tenable. It is shown that similar plates are manufactured by several English concerns and sold for home consumption in England, and the price lists of several of these manufacturing concerns are in evidence. In all of these price lists the per se prices are the same, but they show varying discounts. The plates of the various manufacturers, including those covered by this importation, differ only as to size. The list price of the size 3 1/2 by 3 1/4 inches, equalling 12 1/4 square inches, is listed at 3/-, while the size 3 1/4 by 4 1/4, equalling 13 13/16 square inches, is listed at 3/6 The plates in question, equaling 13 square inches, are invoiced at 6d. per dozen less than the list price of 3 1/2 by 3 1/2 inches, and it would seem to follow that the market value should be at least what the smaller size plates were listed at.

Paragraph R of the tariff act of 1913, supra, provides—

That the words "value," or "actual market value," or "wholesale price," wherever used in this act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, *or similar merchandise comparable in value therewith*, as defined in this act.

I find from the evidence that plates similar to those under consideration are freely offered for sale in wholesale quantities in England, and that therefore, for the purpose of appraisement, in view of this provision in Paragraph R, resort may not be had to the provisions of paragraph L, supra. To hold that such recourse had to be taken in all cases where it could not be shown that merchandise in every minor detail the same as that the subject of appraisement had been sold in the principal markets of the country of exportation would be simply to create chaos in the work of appraising officers. The examiner was, it seems to me, not only liberal in the finding of the per se value but was equally liberal in the allowance of discount, and I therefore affirm his action.

Photographic Dry Plates, C.R. 30586, *aff'd mem.*, C.R. 30870 (1921).

Appraiser found that "there is practically the same amount of glass, the same amount of workmanship, and the same price for the straight as for the bulged glass."[58]

These administrative decisions are not particularly helpful. They indicate that "similar merchandise" need not be the same as that under appraisement in every detail, but offer no guidance as to how much difference between articles is consistent with their being "similar."

In the Tariff Act of 1922, Congress revised the statute governing customs appraisement. Section 402(b) of the Tariff Act of 1922 defined "foreign value," which corresponded to

[58] Decided November 2, 1921.

Sullivan, G. A.—Opinion.—The merchandise under consideration consists of lamp chimneys purchased in Germany, the entered value being marks 12.30 per dozen, and the purchase price being marks 18.64 per dozen. They were appraised at the purchase price. It appears this is the price required to be paid by exporters, and that the home price for use in Germany is marks 12.30 per dozen.

There may be some question as to whether or not the identical merchandise is sold for domestic use. It is unquestioned that similar or comparable merchandise is sold in Germany for domestic use, the only difference being that the merchandise under consideration consists of a street lamp chimney glass bulged, while the comparable merchandise consists of a street chimney lamp glass without the bulge. The latter is used in Germany; the former from a sale made to an American importer to be used in the city of Baltimore.

It is clear from the testimony there is practically the same amount of glass, the same amount of workmanship, and the same price for the straight as for the bulged glass. That being the fact, the domestic price is what governs, and I sustain the entered value.

These importations were made prior to the emergency tariff act of 1921.

Blown Glass Chimneys, C.R. 31289, *aff'd mem.*, C.R. 31459 (1921) & 31608 (1922).

"actual market value" in the 1913 Tariff Act.[59] "Foreign value" was defined as "the market value or the price . . . at which *such or similar merchandise* is freely offered for sale to all purchasers in the principal markets of the country from which exported. . . ." 42 Stat. 949 (emphasis added). The inclusion of

[59] Between 1913 and 1921, "actual market value" as defined in ¶ R of the 1913 Tariff Act was the principal valuation standard for imported merchandise. If "actual market value" under ¶ R could not be calculated, appraisement would be made on the basis of cost of production or of wholesale price in the United States, as provided in ¶ L of the 1913 Act. *See Goodyear Tire & Rubber Co.* v. *United States*, 11 Ct. Cust.App. 351 (1922). In the Emergency Tariff Act of 1921, Congress added a new standard for the appraisement of imported merchandise: export value, defined as follows:

> Sec. 302. That for the purposes of this title the export value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, and plus, if not included in such price, the amount of any export tax imposed by the country of exportation on merchandise exported to the United States.

42 Stat. 15-16 (1921). The principal difference between this definition and the one in ¶ R of the 1913 Act, quoted in full at n. 36, *supra*, is that export value as defined in the 1921 Act is the price at which merchandise is offered for sale in the relevant foreign market "for exportation to the United States." The Supreme Court had ruled in *United States* v. *Passavant*, 169 U.S. 16, 18 S.Ct. 219, 42 L.Ed. 644 (1898), that actual market value had reference to the price at which merchandise was offered for sale in the foreign market for home consumption in the foreign country, interpreting § 19 of the Customs Administrative Act of 1890. The same definition of actual market value was subsequently incorporated into ¶ R of the 1913 Tariff Act, *compare* 169 U.S. at 21-22, 18 S.Ct. at 222 *with* n. 36, *supra*. By 1921, because of the postwar currency inflation in Europe, the export value and the actual market value for home consumption of the same goods were often highly divergent. *See* R. Smith, Customs Valuation in the United States 138-39 (1948); B. Levett, Through the Customs Maze 37-38 (1923). Congress provided in § 303(a) of the Emergency Tariff Act of 1921 that thereafter all references to the value of imported merchandise should "be construed to refer . . . to actual market value as defined by the law in existence at the time of the enactment of this Act, or to export value as defined by section 302 of this Act, whichever is higher." 42 Stat. 16 (1921). The Antidumping Act of 1916 was excepted from the change in valuation made by § 303(a). *See* p. 1216, *supra*.

To summarize, immediately prior to the enactment of the Tariff Act of 1922, imported merchandise was appraised by the following hierarchy of appraisement standards:

> (1) The actual market value as defined in ¶R of the 1913 Act, or the export value as defined in § 302 of the 1921 Act, whichever was higher;
>
> (2) The cost of production, or the wholesale price in the United States, as defined in ¶L of the 1913 Act, if actual market value could not be ascertained.

In the Tariff Act of 1922, Congress continued the valuation system of existing law, with minor changes. H.R.Rep. No. 1223, 67th Cong., 2d Sess. 148 (1922) (quoted in the text following this footnote). However, Congress changed the name "actual market value" used in the 1913 Act to "foreign value," and shortened its definition somewhat. Section 402(a)-(c) of the Tariff Act of 1922 read as follows:

> Sec. 402. VALUE.—(a) For the purposes of this Act, the value of imported merchandise shall be—
>
> (1) The foreign value or the export value, whichever is higher;
>
> (2) If neither the foreign value nor the export value can be ascertained to the satisfaction of the appraising officers, then the United States value;
>
> (3) If neither the foreign value, the export value, nor the United States value can be ascertained to the satisfaction of the appraising officers, then the cost of production;
>
> (4) If there be any similar competitive article manufactured or produced in the United States of a class or kind upon which the President has made public a finding as provided in subdivision (b) of section

the phrase "such or similar merchandise" in the 1922 Tariff Act was intended to continue unchanged, and not to alter, the power which customs appraisers had to consider "similar merchandise comparable in value therewith" under the 1913 Tariff Act. The legislative history of the 1922 Tariff Act reveals that

Congress intended to continue the valuation system of existing law. The House managers in the conference committee explained the legislative history of the appraisement section of the 1922 tariff bill:

> The House bill provided for the "American valuation plan". . . . The Senate amendment strikes out this provision in the House bill and substitutes, with minor changes,

315 of Title III of this Act, then the American selling price of such article.

(b) The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(c) The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. If in the ordinary course of trade imported merchandise is shipped to the United States to an agent of the seller, or to the seller's branch house, pursuant to an order or an agreement to purchase (whether placed or entered into in the United States or in the foreign country), for delivery to the purchaser in the United States, and if the title to such merchandise remains in the seller until such delivery, then such merchandise shall not be deemed to be freely offered for sale in the principal markets of the country from which exported for exportation to the United States, within the meaning of this subdivision.

42 Stat. 949 (1922). It is apparent both from the place which "foreign value" occupied in the overall valuation system established in § 402(a) and from the definition of "foreign value" in § 402(b) that despite minor changes in the definition, Congress intended "foreign value" to correspond to "actual market value" as defined in ¶ R of the 1913 Tariff Act, *see* n. 36, *supra*. Consequently we may consult the construction of the term "similar" in decisions interpreting § 402(b) of the Tariff Act of 1922 in order to determine the meaning of the word "similar" as used in the Tariff Act of 1913.

> *the foreign valuation system of existing law.* . . . [T]he House recedes with an amendment making clerical changes.

H.R. Rep. No. 1223, 67th Cong., 2d Sess. 148 (1922) (emphasis added). *See* S. Rep. No. 595, 67th Cong., 2d Sess. 4-9 (1922); H.R. Rep. No. 248, 67th Cong., 1st Sess. 21-27 (1921).

Since Congress did not intend that the 1922 Tariff Act alter the 1913 Tariff Act with respect to appraisement by reference to sales of similar merchandise, we may consult the construction of the term "similar" in interpretations of § 402(b) of the 1922 Tariff Act to inform our analysis of the 1913 Tariff Act and, ultimately, of the 1916 Antidumping Act. In *United States* v. *Irving Massin & Bros.*, *supra*, the Court of Customs Appeals announced the following rule to govern product comparisons under the 1922 Tariff Act:

> [I]f goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar, within the meaning of section 402(b).

16 Ct.Cust.App. at 25. In *United States* v. *Wecker & Co.*, 16 Ct.Cust. App. 220, 225 (1928), the court explained the applicable standard:

> The question of similarity is, in each case, to be measured by much the same homely rule that applies to the prospective customer who enters a store seeking some utilitarian article of a certain specified name and style; he finds the article requested is not in stock but that another article, of approximately the same price and which will perform the same functions, is capable of the same use *and may be substituted therefor*, is available. Such an article is a similar article, notwithstanding the price, the methods of construction, and the component materials may be somewhat different; but, *for all utilitarian purposes, one is a substitute for the other*. It is in this sense, we believe, that the word similar was used in said section 402(b).

(emphasis added). The same standard has been applied in

customs appraisement cases since 1928 up to the present.[60] In *C. J. Tower & Sons* v. *United States*, 50 C.C.P.A. 76, 81 (1963), the Court of Customs and Patent Appeals stated that:

> the overriding consideration in determining similarity, be it merely similarity of materials or overall similarity of merchandise for appraisement purposes is *commercial interchangeability* rather than considerations of ultimate use or cost of production.

[60] The valuation system in § 402 of the Tariff Act of 1930 was essentially the same as that in § 402 of the Tariff Act of 1922. *Compare* 46 Stat. 708 (1930) (codified with amendments at 19 U.S.C. § 1402 with 42 Stat. 949 (1922) (quoted in pertinent part at n. 59, *supra*). In the Customs Simplification Act of 1956, Congress revised the valuation system, 70 Stat. 943 (1956) (codified at 19 U.S.C. § 1401a), while providing that the 1930 system should remain in effect with respect to certain imported articles. *See* 19 U.S.C. § 1402.

While the details of the appraisement provisions are not relevant here, what is relevant is that the appraisement statutes continued to refer to "such or similar merchandise," and the customs courts continued to interpret the word "similar" in that phrase by referring to the leading cases of *Irving Massin, supra*, and *Wecker, supra*, decided under the Tariff Act of 1922. For example, in *United States* v. *Eggen*, 55 C.C.P.A. 95, 100 (1968), the Court of Customs and Patent Appeals quoted the legal standard for determining similarity from *Massin* and also analyzed the *Wecker* decision. In *United States* v. *Ford Motor Co.*, 46 Cust.Ct. 735, 740, the court set forth the standard of similarity stated in *Massin*, quoting virtually identical language from a subsequent decision of the Court of Customs and Patent Appeals which adhered to the *Massin* rule. Since these decisions are applications of the *Massin* rule, which we have held should also be applied in the interpretation of the 1913 Tariff Act, and thereby to the interpretation of the 1916 Antidumping Act, we are justified in relying on *Eggen, supra*, and *Ford Motor, supra*, in the construction of the 1916 Act.

The Trade Agreements Act of 1979 includes both an antidumping provision which we have previously considered, p. 1223 & n. 45, *supra*, and a revision of the valuation system for imported goods. The new valuation law includes a statutory definition of "similar merchandise" which is essentially the same as the definition found in customs case law beginning with *Irving Massin, supra*, and *Wecker, supra*. The definition provides, *inter alia*, that "similar merchandise" must be "commercially interchangeable with the merchandise being appraised." Pub.L. No. 96-39, 93 Stat. 201 (1979), 19 U.S.C.A. § 1401a(h)(4) (1980).

(emphasis in original). Two customs decisions from the 1960's are particularly pertinent here because they involve products which are functionally similar but are not commercially interchangeable because of different technical conventions which are followed in the United States and in a foreign country. In both cases, the courts ruled that the imported article and the article sold for use in the foreign country were *not* similar for customs appraisement purposes.

In *United States* v. *Eggen*, 55 C.C.P.A. 95, C.A.D. 939 (1968), the Court of Customs and Patent Appeals held that metric size ball bearings sold in the West German market were not "similar" to inch size bearings that were exported to the United States because the products were neither commercially nor mechanically interchangeable, saying at page 101:

> [T]he evidence that the bearings are not *mechanically* or *commercially interchangeable* clearly amounts to substantial evidence to support the Appellate Term's conclusion of dissimilarity. . . .

(emphasis supplied).

Similarly, in *United States* v. *Ford Motor Co.*, 46 Cust.Ct. 735, A.R.D. 124 (1961), the Customs Court held that left-hand-drive automobiles made in Ireland for export to the United States were not "similar" to the right-hand-drive autos made there for home use. The Court said:

> We are in accord with the trial court that the evidence presented establishes that the NASS [left-hand-drive] vehicles are not similar to the cars produced for home consumption in Ireland. . . . One could not be economically converted into the other, nor are they commercially interchangeable.
>
> As was stated by the trial court, *it is well settled that, as a general rule, 'commercial interchangeability' is one of the essential features of similarity. . . .*
>
> Here, while the NASS [left-hand-drive] vehicles may be made of some of the same materials as the cars for Irish consumption, they are not commercially interchangeable, nor, because of different rules of the road and other legal

requirements, are they adapted to the same use. (emphasis added).

Like metric ball bearings and right-hand-drive automobiles, electronic products made for use in Japan are adapted to different technical conventions from those which are followed in the United States. Although the absence of commercial interchangeability of those products with their U.S. counterparts may be the result solely of those different conventions, the teaching of customs law is that "similarity" should still be determined by the test of commercial interchangeability. Thus even if all the differences between electronic products manufactured for use in Japan and electronic products manufactured for use in the United States are necessary to conform to the different technical requirements of broadcasting and electrical power distribution in the two countries, and even if there are no other differences between the products, still they are not similar under relevant law unless they are commercially interchangeable.

We now turn to the application of the two rules—the standard of like grade and quality under the Robinson-Patman Act and the standard of similarity under customs law—to the facts before us.

VI. *Standards For Summary Judgment; Application Of The Legal Standards Of Comparability To The Facts*

Rule 56 of the Federal Rules of Civil Procedure permits the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The burden of demonstrating that there is no genuine issue of material fact rests on the moving party. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Summary judgment may not be granted if there is "the slightest doubt" about material facts. *Tomalewski* v. *State Farm Life In-*

surance Co., 494 F.2d 882, 884 (3d Cir. 1974).[61] Consequently, a motion for summary judgment may not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside as against the weight of the evidence. *Perks* v. *Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979), *quoting Rosenthal* v. *Rizzo*, 555 F.2d 390, 394 (3d Cir.) *cert. denied*, 434 U.S. 892, 98 S.Ct. 268, 54 L.Ed.2d 178 (1977). Similarly, summary judgment is not appropriate if the resolution of a material issue of fact turns on the credibility of witnesses. *Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Remak* v. *Quinn*, 611 F.2d 36 (3d Cir. 1979). All inferences from the evidence must be drawn in favor of the party opposing the motions—here, the plaintiffs. *Small* v. *Seldows Stationery*, 617 F.2d 992 (3d Cir. 1980).

Although we recognize that the standards governing the grant of summary judgment are strict, we are convinced that those standards are met here. We have stated the material

[61] The "slightest doubt" formulation of the evidentiary standard for summary judgment has been explictly rejected by the Second Circuit. *Beal* v. *Lindsay*, 468 F.2d 28[illegible] (2d Cir. 1972). The National Commission for the Review of Antitrust [illegible]nd Procedures, appointed pursuant to Executive Order 12022 to make recommendations on "[r]evision of procedural and substantive rules of law needed to expedite the resolution of complex antitrust cases," criticized the "slightest doubt" formulation as "an unwarranted gloss on the 'genuine issue' requirement." National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General at 70, 80 F.R.D. 509, 566 (1979). However, the "slightest doubt" formulation has been adopted by the Third Circuit, *Tomalewski*, supra, 494 F.2d at 884, and by other circuits *see* Antitrust Commission Report at 79 n.44, 80 F.R.D. at 575, and is binding on this court, which must apply the law as stated by the U.S. Court of Appeals for the Third Circuit. Of course, in order to preclude the grant of summary judgment, any doubt must be based on "significant probative evidence" rather than mere allegations. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 935-36 (3d Cir.) (en banc), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970).

facts as to which there is no genuine issue in Part III, *supra*. As we noted there, the facts related are not subject to even the "slightest doubt" because they are admitted by the plaintiffs. Moreover, we have made no inferences from those facts to plaintiffs' detriment except those which are compelled by the rules of logic. A court is not required to suspend its ability to reason when considering a summary judgment motion, nor to draw inferences from the facts of which they are not logically susceptible. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 287-89, 88 S.Ct. 1575, 1591-92, 20 L.Ed.2d 569 (1968); *Chirinos de Alvarez* v. *Creole Petroleum Corp.*, 613 F.2d 1240, 1244-45, (3d Cir., 1980).

We found in Part III that U.S. and Japanese television receivers are physically different in that they have different VHF and UHF tuners and different power transformers. As a result, TV receivers intended for use in Japan, if used in the United States, could receive only 4 VHF television channels and a limited number of UHF channels, and would be in serious danger of failing because of overheating. As a result of the physical differences between the two types of receivers it would, in the words of plaintiffs' expert and affiant, be "ridiculous" for a consumer in the United States to try to use a Japanese domestic TV receiver. We found that U.S. and Japanese TV receivers would differ markedly in consumer use, consumer preference, and marketability, since any rational consumer in the United States would prefer a receiver manufactured for use in the United States to one manufactured for use in Japan.[62]

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[62] The determination of the effects of the undisputed physical differences on consumer use, consumer preference, and marketability is necessarily hypothetical since it is undisputed that Japanese domestic electronic products have not been marketed in the United States. Our inference that the products are not usable to consumers or marketable in the country for which they were not designed is based on the rules of logic, *see First National Bank of Arizona*, *supra*, and on the characteristics of a hypothetical "rational consumer." The use of the term "rational" here is not meant to refer to any economic theory of maximization of utility, but rather to the ordinary common-sense meaning of the word. For example, we deem it clear beyond peradventure that a rational consumer would prefer a TV set which receives all broadcasts to one that only receives broadcasts on a limited number of channels.

Similarly, radios, phonographs, and tape and cassette recorders intended for use in Japan and in the United States are physically different in two respects. Except for battery-operated products, they have different power supply components, or different alternating-current motors, or both; and radios which receive FM broadcasts have different FM tuners. As a result of these physical differences, non-television products designed for use in the United States which are not battery-operated would not operate satisfactorily if they were used in Japan. The audio output of all radios, phonographs, and tape and cassette recorders would include an objectionable hum, and the motors of phonographs and tape and cassette records would run at the wrong speed. In addition, radios which receive FM broadcasts would receive transmissions on only about a tenth of the FM band. We found in Part III that these physical differences in non-television products would affect consumer use, consumer preference, and marketability. The only exceptions to this finding were battery-operated electronic products which do not receive FM radio broadcasts.

We are mindful of the statements of plaintiffs' experts Brugliera, Horn, and Lukas that the physical differences between U.S. and Japanese products upon which we rely to grant summary judgment are insignificant from a technical or a cost standpoint. However, for reasons which we have stated at great length, the controlling legal standards are ones that speak in terms of consumer use, consumer preference, and marketability. They do not speak in terms of technical significance or cost factors. The determination of the *legal* significance of the undisputed physical differences is for the court, and not for plaintiffs' experts. Thus, although the statements of plaintiffs' experts as to the technical insignificance of those differences and the irrelevance of the differences to manufac-

turing costs are plainly sufficient to create a genuine issue of fact, it is an issue which is not material to the disposition of these motions.

For the reasons stated in Part III and briefly restated here, it is absolutely clear, *i.e.*, not subject to question, that with respect to nearly all categories of consumer electronic products, there are substantial physical differences between products manufactured for use in Japan and those manufactured for use in the United States, and those differences render articles manufactured for use in each country unusable and unmarketable in the other. Consequently, with narrow exceptions, the products are not of like grade and quality.

It is equally clear that consumer electronic products manufactured for use in the two countries, with the same exceptions, are not commercially interchangeable and are not adapted to the same use. Consequently, with the same exceptions, the products are not similar under customs appraisement law. The *Eggen* decision, concerning metric ball bearings, and the *Ford Motor* decision, concerning right-hand-drive automobiles, are highly pertinent here, because in those cases the customs courts ruled that products which are designed to conform to the different technical conventions of the U.S. and other nations are not similar, within the meaning of customs appraisement law.

Since the products, with certain exceptions, meet neither of the tests which we have held must be applied to determine their comparability for purposes of the Antidumping Act of 1916, they are not comparable for purposes of that Act. To reiterate, the exceptions we have noted include only a small class of consumer electronic products. These are phonographs, tape and cassette recorders, and non-FM radios, and only products in those categories which are battery-operated. With respect to this class of products, the defendants have proffered no evidence to demonstrate that there is no genuine issue of fact material to their comparability under the 1916 Antidumping Act.

Except with respect to this narrow class of products, plaintiffs' claims under the 1916 Antidumping Act rests on the comparison of products sold in the United States and products sold in Japan, which products are not comparable under the 1916 Antidumping Act for the reasons which we have stated at great length. Accordingly, the defendants' motions for summary judgment will be granted with respect to all television receivers, all products which are not solely battery-operated, and all products which receive FM radio transmissions. The motions will be denied with respect to all other products, a residual category which consists only of battery-operated consumer electronic products in the following three categories: phonographs, tape and cassette recorders, and radios which do not receive FM transmissions.

Since NUE's claims under the Antidumping Act of 1916 involve only television receivers, and we have held that U.S. and Japanese television receivers are not comparable under the 1916 Act, we will dismiss Count I of NUE's Complaint, which states its 1916 Act claims. The residual category of non-television products which are not affected by our order, described *supra*, is included within Zenith's claims under the 1916 Act claims. Because a portion of Zenith's claims survive our summary judgment order, we do not dismiss those counts of Zenith's Complaint and Counterclaim which state its dumping claims.[63]

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[63] We are uncertain whether or not there *are* any products in this residual category which Zenith has sought to compare for purposes of its dumping claims. The list of technical comparisons of non-television products which plaintiff provided in the FPS, v. 17 at 8151-64, describes the products very briefly, *e.g.*, "AM radio." This brief description is insufficient to enable us to determine whether a particular product is solely battery-operated and receives no FM radio transmissions, the two characteristics which together would protect the products from our summary judgment order. If there are no such products, then we have granted summary judgment for defendants on all of the plaintiffs' dumping claims. If the defendants can demonstrate that there are no products in this residual category, they may of course move for dismissal of Count VII of Zenith's Complaint and Count VI of Zenith's Counterclaim. We will take this matter up at our next regularly scheduled pretrial conference. *See* n. 28, *supra*.

We have reflected long and hard on the issues which have been resolved in this lengthy opinion. During those reflections, we have conjured the image of an American industrialist or labor union official or public official, concerned about the health of American industry, who possessed a TV set manufactured in Japan, and who had just returned from a trade mission to Tokyo where, in his hotel room, he had turned on a TV set made by the same manufacturer as his set at home, which had a similar cabinet and an equally clear and bright picture. That indivdual might well say, a la Gertrude Stein: a TV set is a TV set is a TV set. He or she might think that we should not construct a chain of analysis which absolves the Japanese TV manufacturers, who have in the decades of the 1960's and '70's made such inroads into the U.S. market, from the asserted consequences thereof. We felt some initial discomfiture over this putative lay reaction, but the discomfiture quickly abated when we focused on three considerations, two of which have been advanced at length in this opinion. First, the 1916 Act is not a protectionist act, but an antitrust act, and the purpose of antitrust acts is to foster competition (albeit fair competition) for the benefit of the consumer. Second, we cannot rewrite an Act of Congress to achieve a result which some may think desirable. Third, the plaintiffs' conspiracy claims under the Sherman Act are bottomed on much the same factual ground as their claim under the 1916 Act. The plaintiffs are proceeding on the Sherman Act case and, if it survives the defendants' summary judgment motions addressed thereto, they will go to trial on the Sherman Act claims this fall.

This reaction is consistent with that of Judge Schwartz in *Pezetel*. He concluded that the 1916 Act did not cognize a claim where the goods were, in essence, specially manufactured for the American market (there being no golf courses in Poland and no golf carts sold there), even though the alleged consequences for the American manufacturer were the same as those alleged here.

An appropriate order follows. The order includes the statement necessary to certify it for an interlocutory appeal pur-

suant to 28 U.S.C. § 1292(b). We turn now to a discussion of the factors justifying an immediate appeal of this opinion and order.

VII. *Certification For Interlocutory Appeal Under 28 U.S.C. § 1292(b)*

Under 28 U.S.C. § 1292(b), a district judge may certify an order for interlocutory appeal if 1) it involves a "controlling question of law;" 2) there is "substantial ground for difference of opinion" with respect to that question; and 3) immediate appeal "may materially advance the ultimate termination of the litigation." In a prior opinion in this litigation, we examined in some detail the recent case law in the Third Circuit interpreting § 1292(b). 478 F.Supp. 889, 942-46 (E.D.Pa. 1979). We do not repeat the analysis there, but write briefly to explain why the accompanying order includes the statement necessary to certify it for immediate interlocutory appeal.[64]

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[64] Certification of an order for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is accomplished by placing in the order itself a statement that the court is of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. This statement is prescribed by the language of § 1292(b).

Neither the plaintiffs nor the defendants have formally moved for certification of this opinion and order; obviously they could not since, as of this writing, they had not seen it. At a recent hearing, however, counsel for the parties, indicated in response to our inquiry that they would assuredly seek certification if the legal issue were decided adversely to their position. Pretrial Order No. 236 (transcript of pretrial conference of April 2, 1980). Subsequently, however, plaintiffs' counsel informed us that plaintiffs would prefer to examine our opinion before deciding whether or not to seek § 1292(b) certification.

We have the authority to certify our order under § 1292(b) *sua sponte*. *See, e.g., Ettinger* v. *Central Penn National Bank*, 2 B.R. 385 (E.D.Pa. 1979) (Bechtle, J.); *Bernstein* v. *Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Securities Litigation*, 75 F.R.D. 702 (S.D.Cal. 1977), *rev'd on other grounds*, 609 F.2d 411 (9th Cir. 1979). Be-

It is plain that the order involves a "controlling question of law." That phrase includes at least "every order which, if erroneous, would be reversible error on final appeal," as well as other questions which are sufficiently "serious to the conduct of the litigation." *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). Our interpretation of the Antidumping Act of 1916 presents a pure question of law which plainly would constitute reversible error if it is, in fact, erroneous. It is therefore a controlling question of law under § 1292(b).

There is a substantial ground for difference of opinion on the interpretation of the 1916 Antidumping Act. As we have noted, the few prior decisions construing that Act had no occasion to explore it in the depth which we have attempted to reach herein. Accordingly, this opinion and order not only involve an issue which is of first impression, but also involve an Act which, despite its venerable age (64 years), is virtually a *statute* of first impression. While we are confident that our analysis of the statute is correct, we are aware that our analysis is highly complex, and that the issues presented are novel. Moreover, we have engaged in the always difficult enterprise of construing a statute which is not clear on its face, a task compounded by the statute's vintage. These circumstances compel us to recognize that our decision might be erroneous, and that there is accordingly a substantial ground for difference of opinion within the meaning of § 1292(b).

The final criterion of § 1292(b) is also satisfied here. An immediate appeal unquestionably will materially advance the ultimate termination of the litigation. The pricing behavior of the defendants and their intent is not only crucial to plaintiffs'

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cause we are certain that the order should be certified, and in order to save the time that would be consumed by proceedings on a separate motion for certification, we have decided to include the certification in the order granting summary judgment. We are concerned over time because we wish to avoid slippage in the trial date. This case will be a decade old on December 21, 1980.

claims under the 1916 Antidumping Act, it is also central to their antitrust claims under the Sherman Act, which have not been considered in this opinion. Accordingly, a great deal of information concerning defendants' prices and intentions will be presented to the finder of fact at the trial of this litigation, now scheduled to begin in October 1980, whether or not the Court of Appeals reviews the instant opinion and order in advance of the trial. If this opinion and order were not certified for interlocutory appeal, but were reversed after the conclusion of the trial, we would be required in a subsequent trial of the 1916 Act dumping claims to retry in essence the major portion of the Sherman Act case. Moreover, even trial of the portions of the case discrete to the dumping claim might take longer, if only because of the need for general jury orientation as to the background of the litigation. Since the anticipated length of trial is now estimated at 12 months, a retrial of a major portion of the litigation would be an enormous waste of the resources of the judicial system, as well as the parties, witnesses, lawyers, jury, and everyone else involved in the litigation.

For these reasons we not only certify the accompanying order for immediate interlocutory appeal, but also urge the Court of Appeals to grant the plaintiffs leave to appeal. The exercise of the Court of Appeals' discretion to permit appeal of a certified order is apparently governed in part by the uniqueness, exceptionality, or extraordinary importance of the question of law involved. 478 F.Supp. at 945-46. As we have noted, our decision to certify our order is prompted in large part by the exceptional novelty and complexity of the legal question here presented. Moreover, a prompt and authoritative disposition of the question is extremely important to the prudent management of the litigation.

In fact, the certification procedure of 28 U.S.C. § 1292(b) was intended specifically to expedite the disposition of "big" cases like M.D.L. 189. A committee of the Judicial Conference, which proposed the statute, stated that it "should and will be used only in exceptional cases where a decision of the appeal

may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." 1958 U.S. Code Cong. & Admin. News, pp. 5255, 5260. The report of the House Judiciary Committee explicitly adopted the view of the Judicial Conference, and added:

> There should be some way, for example, in long-drawn-out cases such as antitrust and conspiracy cases, to dispose of vital questions which are raised in the trial without having to wait for the taking of testimony and the conclusion of trial before the questions can be finally determined on appeal.

H.Rep. No. 1667, 85th Cong., 2d Sess. 1-2 (1958). In *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433-34 (3d Cir. 1958), Judge Maris, writing for the Court of Appeals sitting en banc, quoted a large portion of the House Judiciary Committee report, and held:

> It is quite apparent from the legislative history of the Act of September 2, 1958 that Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.

Id. at 433. This is, of course, not "ordinary litigation."

In actual practice, the scope of application of § 1292(b) has not been restricted narrowly to "exceptional cases." *See* 16 C. Wright, Miller, Cooper, and Gressman, Federal Practice and Procedure § 3929 (1977); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv.L.Rev. 607 (1975). While the legislative history does not preclude the use of § 1292(b) procedures in other cases, it is clear that the statute was framed with special attention to the problems of protracted and expensive litigation, which seem to arise most frequently in big antitrust cases. Because Congress intended that § 1292(b) procedures be used to expedite the resolution of cases like the one before us, and because of the extraordinary burden that the case has been on the litigants and this court, we

feel especially justified in invoking the aid of the Court of Appeals by certifying this opinion and order for interlocutory appeal.[65]

Third Circuit Rule 23 requires that we state the controlling question of law which is the basis of the certification of our order for interlocutory appeal, although the scope of review is within the discretion of the appellate court. *See* 478 F.Supp. at 946. We state the controlling question thus: Are consumer electronic products manufactured for use in the United States and those manufactured for use in Japan comparable in a proceeding under the Antidumping Act of 1916, 15 U.S.C. § 72, even though: (1) the products are adapted to the technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, which differ as between the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable?

Pretrial Order No. 237

AND NOW, this 14th day of April 1980, upon consideration of the foregoing Opinion, and of various defendants' motions for summary judgment on plaintiffs' claims under the Antidumping Act of 1916, 15 U.S.C. § 72, it is ORDERED as follows:

1. With respect to television receivers, defendants' motions are GRANTED.

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[65] That portion of our order which dismisses Court I of the NUE complaint in Civil Action No. 74-3247 might also be appealable as a final judgment under Federal Rule of Civil Procedure 54(b) if the requisites of that Rule are met. *See generally Curtiss-Wright Corp.* v. *General Electric Co.*, 597 F.2d 35 (3d Cir.) *rehearing en banc denied*, 599 F.2d 1259 (3d Cir. 1979), *cert. granted*, 444 U.S. 823, 100 S.Ct. 43, 62 L.Ed.2d 29 (1979); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). Since we have determined that the order should be certified for interlocutory appeal under § 1292(b), we do not reach the issues related to certification under Rule 54(b) for appeal as a final judgment.

2. With respect to all products which are not solely battery-operated, defendants' motions are GRANTED.

3. With respect to all products which receive FM radio transmissions, defendants' motions are GRANTED.

4. With respect to products which are not included in paragraphs 1, 2, or 3, defendants' motions are DENIED.

5. Count I of the Complaint of National Union Electric Corporation in Civil Action No. 74-3247 is DISMISSED.

6. We are of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. Accordingly, this order is certified to the court of appeals for review pursuant to 28 U.S.C. § 1292(b). The controlling question of law is as follows: Are consumer electronic products manufactured for use in the United States and those manufactured for use in Japan comparable in a proceeding under the Antidumping Act of 1916, 15 U.S.C. § 72, even though: (1) the products are adapted to the technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, which differ as between the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable?